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DEFENSE PRODUCTION ACT AMENDMENTS OF 1990

REPORT

OF THE

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 1379

together with

ADDITIONAL VIEWS

July 13 (legislative day, July 10, 1990.—Ordered to be printed

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July 13 (legislative day, July 10), 1990.—Ordered to be printed

Mr. Riegle, from the Committee on Banking, Housing, and Urban Affairs, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 1379]

I.—Introduction

On May 24, 1990, the Senate Banking Committee marked up and ordered to be reported S. 1379, a five title bill which among other things reauthorizes and amends the Defense Production Act (DPA) of 1950 until September 30, 1993. The bill addresses the nation's response to erosion of its defense industrial base in two principal ways. First, it institutes measures to improve information on the loss of industrial and technological capabilities in areas critical to national defense. Second, it enhances the authorities provided in the Defense Production Act to maintain and improve such capabilities. Title IV of S. 1379 does not amend the Defense Production Act. It amends banking and securities statutes and is a self-contained title whose purpose and background are fully discussed in the Title IV portion of this report.

II.—Statement of Purpose

The principal purpose of Titles I, II, and III of this bill is to modernize and strengthen the Defense Production Act of 1950, and to extend the Act's authorization through September 30, 1993. The Defense Production Act provides to the President an array of Government-wide authorities with which to mobilize the Nation's productive capacities for national defense purposes, especially during periods of national emergency. Provisions of the Act are used during peacetime to give priority to contracts for essential national defense requirements. Other provisions of the Act provide authority to undertake peacetime projects to preserve and enhance the capacities and capabilities of segments of the Nation's overall industrial base and technology base essential to the national defense. The Act also provides limited antitrust protections to joint industry undertakings initiated by the President for the purpose of enhancing the Nation's defense mobilization capabilities.

The amendments made by S. 1379 expand the reach and enhance the utility of the Act's current authorities regarding projects to maintain and strengthen the defense industrial base and technology base. Other amendments encourage industry to jointly undertake efforts to exploit the full potential of emerging technolgies in order to expand the capability of the Nation's industrial sectors to cost-effectively produce defense materiel and to sustain the technological superiority of the material produced. Other provisions of the bill improve the information available regarding the health of those segments of the Nation's overall industrial base and technology base vital to national defense, especially with respect to small subcontractors and suppliers, and to improve the Act's current processes for assuring the impact of defense trade offset arrangements. S. 1379 also calls for a better integration of national security policy, national economic policy, and industrial capabilities planning. In addition, the bill includes provisions designed to encourage investment in modernized production systems and equipment so as to improve the defense industrial base.

The authorities provided by the DPA traditionally have been used sparingly during peacetime. For most of the postwar period, the United States has maintained substantial industrial production capabilities and a large lead in essentially all areas of technology critical to national defense. But in the past fifteen years, Europe, Japan, and certain newly industrializing countries have become competitive suppliers of a full range of industrial products and technologies. At the same time, due to the military's increased reliance upon dual-use technologies and production processes, the defense industrial base has become indistinguishable from the nation's civilian industrial base in many respects. As the U.S. has come to rely on foreign sources of supply for industrial products, it has lost the indigenous capacity to produce key components of weapons systems essential to national defense. Between 1982 and 1987, the number of U.S. companies supplying the Pentagon declined by roughly two thirds. As U.S. armed forces are reduced in response to easing world tensions, national security is likely to rely increasingly upon military potential, i.e., industrial and technological capabilities. Accordingly, peacetime use of Defense Production Act authorities to maintain the ability of our industrial and technological base to respond to mobilization requirements has become increasingly appropriate. The bill's essential purpose is to adapt the Act to these changed circumstances.

Title IV of the bill contains the "Fair Trade in Financial Services Act of 1990." This title amends the International Banking Act of 1978, the Securities and Exchange Act of 1934, and the Investment Advisers Act of 1940 in order to encourage foreign countries to offer United States financial institutions that operate or seek to operate in them de facto national treatment.

A. BACKGROUND AND SUMMARY OF AMENDMENTS TO THE DEFENSE PRODUCTION ACT

Background

The Defense Production Act of 1950 (50 U.S.C. App. 2061, et seq.) (DPA) was initially enacted to mobilize the Nation's productive capacity to meet the challenge of the Korean War. As enacted, the DPA provided the President with a very broad array of powers in seven titles, as follows:

Title I—Priorities and Allocations.
Title II—Authority to Requisition and Condemn.
Title III—Expansion of Productive Capacity and Supply.
Title IV—Price and Wage Stabilization.
Title V—Settlement of Labor Disputes.
Title VI—Control of Consumer and Real Estate Credit.
Title VII—General Provisions.

Only Titles I, III, and VII remain in effect. The authorities granted by Titles II, IV, and VI expired on June 30, 1953, but have not been repealed. These dormant titles remain available to be reauthorized, if required to meet a future national emergency.

Title I (Priorities and Allocations) of the DPA provides to the President the authority to require priority performance of contracts which have been determined to be necessary for the national defense. This authority is used by the Department of Defense, and other agencies, when needed. Title I also provides the authority to allocate materials needed for production of defense materiel and facilities for their production. Criminal sanctions are provided for the enforcement of these authorities.

Title III (Expansion of Productive Capacity and Supply) of the DPA authorizes the use of a broad range of economic incentives to assure that American industry will be able to provide the broad range of materiel and services that are required for the national defense. The principal incentives authorized are purchase guarantees, loan guarantees, and loans. The purchase guarantee has been exclusive Title III incentive used during the 1980s. The Title III authority helps to maintain and expand the industrial base and technology base supporting natikonal defense in two basic ways. First, it can be used to create or expand domestic production capabilities for materiel that is currently used by the Nation's military forces. Second, it can be used to foster new industrial or technological capabilities that can meet future needs in peacetime or upon mobilization. As with all of the DPA's authority, the Act's Title III authorities are available for use by all Government agencies. The Title III Program is coordinated by the Department of Defense, with the Air Force serving as Program manager. Recent Program participants include NASA, and the Departments of Commerce, Energy, and Interior.

Title VII (General Provisions) includes an array of provisions furnishing authority for additional programs to help maintain the vitality of the Nation's industrial and technological base as well as other provisions which establish the Act's definitions and set the authorization levels. To encourage joint undertaking by industry to improve industrial preparedness, the Act affords some legal defenses to so-called "voluntary agreements" initiated by the President in the event of lawsuits for alleged violations of the various antitrust laws. Title VII also includes the provision which gives the President the authority to suspend or prohibit the acquisition, merger, or takeover of a domestic firm by a foreign firm if such action would threaten to impair national security. This provision was added to the Act by Section 5021 of Public Law 100-418, the Omnibus Trade and Competitiveness Act of 1988, the so-called "Exon-Florio Amendment."

The DPA has been called a "statutory cornerstone of our country's national security." The Act has been reauthorized and amended numerous times since 1950. The last major review of the Act's basic provisions for maintaining industrial preparedness took place during the 1984 reauthorization, which expired on September 30, 1989. Public Law 101-137 provided a short-term extension of the Act's authorities until August 10, 1990.

Summary of the Defense Production Act Amendments

The amendments to the Defense Production Act in S. 1379 are principally designed to strengthen the Act's current provisions to improve their utility as an array of permissive authorities to preserve and expand those segments of the Nation's industrial base and technology base which support national defense requirements. The bill also contains a substantial number of provisions, the purpose of which are to modernize a forty year old statute by updating the Act's terminology and eliminating provisions that no longer serve a function.

Declaration of Policy

The revision to the Act's Declaration of Policy is grounded on two fundamental themes, reflected in the other provisions of S. 1379 amending the operative provisions of the DPA. First, the "defense industrial base" and the "defense technology base" can no longer be viewed as separate and distinct from the Nation's overall industrial and technological base. Rather, the defense industrial base and technology base are merely subsets or segments of the overall national economic base that focuses on meeting national defense requirements. Hence, the strength and vitality of the Nation's overall industrial and technology base has a direct bearing on the Nation's capacity to effectively meet its national defense requirements.

Second, the condition of the industrial base and technology base supporting national security directly influences industry's capabilities to meet the increased demands of war or national emergency, as well as its ability to effectively produce defense materiel in peacetime. The Nation's continued ability to field affordable, technologically superior, military hardware in a timely fashion can be traced back to the overall condition of the industrial and technology base.

Amendments to Title III of the DPA

S. 1379's amendments expand the reach and enhance the utility of existing Title III authorities in several important ways. First, the amendments would expand the class of eligible projects by broadening the Act's definition of "industrial resources" and by specifically recognizing the eligibility of projects which foster development or utilization of "critical technologies." To provide more stable funding for the Title III Program, S. 1379 establishes a separate revolving fund, which is capped at $250 million. The bill proposes to initially capitalize this new Defense Production Fund through a one-time transfer of $200 million from the unobligated balances of the National Defense Stockpile Fund.

In addition to strengthening the Act's existing Title III authorities, S. 1379 modifies the Act's current reporting requirements relating to the effects of offsets on the defense industrial base, as required by Section 309. In order to assure full consideration and appropriate presentation of differing agency views and to improve generally the responsiveness of the report to the Act's requirements, the bill transfers the lead of the interagency task force that prepares the Section 309 Offset Report to the Department of Commerce, replacing the Office of Management and Budget. To improve the database upon which the offset report is based, S. 1379 requires industry to report on any contract for the sale of a weapon system or defense related item to a foreign country or firm, if such contract is subject to an offset agreement exceeding $5 million. During mark-up, S. 1379 was amended to codify the "Policy on Offsets in Military Exports," issued by the President on April 16, 1990, pursuant to section 825 of Public Law 100-456, the "National Defense Authorization Act, Fiscal Year 1989." This reinforces that national policy and assures Congress a participatory role in the formulation of future modifications.

As part of the bill's overall thrust of improving the data available to defense industrial base policymakers, S. 1379 was modified to require an assessment of those subsectors of the Nation's overall economy identified as being critical to the development and production of components essential for national defense materiel. Special attention is directed at lower-tier subcontractors and suppliers, about whom very little information is currently available.

Amendments to Title VII of the DPA

S. 1379's amendments to Title VII of the Act encompass several important matters in addition to specifying the definition of key terms currently in the Act and being added to complement the enhancements made by the bill. First, S. 1379 amends the Act's existing provisions providing limited protections to "voluntary agreements" initiated by the President, by modestly enhancing current authorities. These amendments are essentially derived from S. 2168, the Administration's bill. More importantly, S. 1379 also authorizes the establishment of "industry consortia" for the purpose of jointly undertaking a specified program of basic research, research and development, production, or a flexible manufacturing network to provide industrial resources or emerging technologies essential for the preservation or enhancement of the industrial base or technology base supporting national defense. These provisions establish more practical antitrust immunities for actions undertaken within the scope and limitations of the consortium's charter, while assuring strong safeguards for the public. The amendments prescribe on open process for the granting of a consortium charter, monitoring its activities, and affording an aggrieved person the opportunity to bring a civil action against a consortium to enjoin damaging activity and to obtain actual damages for injuries sustained. The provisions make explicit that no protections are accorded to a consortium for activities outside the scope of its charter.

Second, the bill includes a provision providing for systematic and continuous data collection and analysis procedures relating to the condition of the industrial base supporting national security. The institutionalization of such procedures on a coordinated, interagency basis will provide industrial preparedness policymakers with the data needed to most effectively employ the Act's authorities and allocate scarce resources.

In addition, the bill amends Title VII to require the Central Intelligence Agency jointly with the Federal Bureau of Investigation to conduct an intelligence study to determine whether there exists coordinated strategies by foreign entities to acquire U.S. companies which are on the leading edge in research, development, and production of critical technologies, and whether there are industrial espionage activities by foreign entities aimed at obtaining U.S. commercial secrets related to critical technologies.

Reauthorization

S. 1379 extends the Act's various authorities until September 30, 1993. The bill authorizes the appropriation of a total of $250 million for Fiscal Years 1991, 1992, and 1993.

B. VOTE TO REPORT THE BILL

On May 24, 1990, the Senate Banking Committee by voice vote, with no dissenting votes, reported out S. 1379.

C. HISTORY OF THE LEGISLATION

1. Introduction of S. 1379 and S. 2168

S. 1379, "The Defense Production Act Amendments of 1989," was introduced in the Senate on July 24, 1989, by Senators Dixon, Heniz, Shelby, Wirth, and D'Amato and was referred to the Senate Banking Committee. On February 26, 1990, S. 2168, containing the Administration's proposed amendments to the Defense Production Act (DPA), was introduced by Senator Garn by request. This bill was also referred to the Senate Banking Committee. Provisions of S. 2168 are corporated into the version of S. 1379 reported by the Committee.

2. Markup on May 24, 1990

On May 24, 1990, the Senate Banking Committee met to mark up proposed amendments to the DPA. After marking up the Committee Print the Committee took up S. 1379 and deleted all but the enacting clause and reported S. 1379 as amended by the Committee Print.

3. Studies on the U.S. Defense Industrial and Technology Base

Steady erosion of the defense industrial and technology base has been the subject of numerous DOD, industry, General Accounting Office (GAO), and Congressional reports. In 1985, John Young, the CEO of Hewlett-Packard Company and the Chairman of President Reagan's Commission on Industrial Competitiveness, reported to the President that:

> America's ability to compete in world markets is eroding. Growth in U.S. productivity lags far behind that of our foreign competitors.

In urging the President to take steps to stop this erosion Mr. Young noted that "a strong industrial base is also vital to our national security." During the five years that have passed since that study was issued, concern about our international competitive position has heigthened. In a July 1988 report entitled "Bolstering Defense Industrial Competitiveness," the Undersecretary of Defense for Acquisition, Dr. Robert Costello, stated that the Department of Defense was becoming increasingly concerned over the Nation's ability to compete in the international markeplace. The report noted that:

> Many basic industries of importance to defense production have declined, threatening the responsiveness of our industrial base. Left unchecked, such erosion could rob the U.S. of industrial capabilities critical to national security.

The report states that certain industries such as semiconductors, telecommunications, and computers are strategic and must be revitalized and preserved becasue they are linked to so many other important industries.

In October of 1988, in a report that received front page coverage in the New York Times, the Defense Science Board released its own examination of this issue entitled "A Study of America's Defense Industrial and Technology Base." The Board, made up of distinguished American industrial and financial leaders, stated that in the years since its last report in 1980:

> * * * the global political and economic scene has changed considerably. Americans technology superiority has diminished. Many countries including Japan and the Soviet Union challenge our leadership in technologies essential to defense. We are losing out in the semiconductor field * * * these technologies are the foundation of our very defense system * * * more and more of our defense systems require manufactured components from foreigners.

The Defense Science Board also stated that our allies "make a concerted effort to directly tie their nation's industrial policy to national security goals," and called upon the U.S. Government to identify and support "those technologies where our country should be a leader or competitive to assure national security and economic competitiveness.

In 1989, the Center for Strategic and International Studies issued an analysis entitled "Deterrence in Decay," written under the leadership of Senators Bingaman and McCain, stating:

> The U.S. defense industrial base faces significant challenges and little is being done to address them. If present trends persist, the once-mighty arsenal of democracy could become * * * perhaps even incapable of manufacturing the material required for deterrence or for protecting U.S. national interests around the globe.

The Office of Technology Assessment (OTA) issued a pair of recent studies on the decline of U.S. high technology industries needed for the nation's defense. OTA's 1989 report entitled "Holding the Edge" states that U.S. leadership in high technology industries vital to defense is eroding in the face of strong international competition. It further stated that "longstanding industrial and trade policies may have to be reformed if the United States is to maintain the industrial capacity necessary to support essential dual use technologies." In its February 1990 report entitled "Making Things Better: Competing in Manufacturing," the OTA stresses that American manufacturing faces stiffer challenges than ever before from Japan and other East Asian countries, and potentially from Europe. According to the OTA report:

> [U]nless both government and industry make significant changes to meet these challenges, U.S. manufacturing will fall to second rank * * *

On the whole, the studies examining the condition of the U.S. defense industrial and technology base agree that America's international competitive position in defense production has declined and that the U.S. has become increasingly dependent on foreign suppliers for items critical to our national defense. As stated above, the purpose of the "Defense Production Act Amendments of 1990" is to enhance the capacity of the DPA of 1950 to prevent and respond to losses of industrial and technological capabilities essential to national security. In so doing, the President will be better able to utilize the authority provided in Section 2 of the DPA of 1950 for "preserving and enhancing the defense industrial and technology base of the United States during peacetime and mobilizing the Nation's productive capacity for national defense during periods of national emergency."

4. Committee Hearings

The Senate Committee on Banking, Housing, and Urban Affairs held hearings relating to the Defense Production Act, the Nation's economic outlook, and competitiveness on July 11, July 19, and November 17, 1989. In 1990, the Committee continued with hearings on February 28, March 1, March 8 and March 22.

The witnesses at the July 11, 1989, hearing on the DPA and Competitiveness were: Frank Carlucci, the Vice Chairman of The Carlyle Group in Washington, D.C., formerly the Secretary of Defense; B.R. Inman, the Chairman and CEO of Westmark Systems, Inc., formerly Deputy Director of the CIA; Dr. Robert B. Costello of The Hudson Institute, Indianapolis, Indiana, formerly Undersecretary of Defense for Acquisition. Testifying at the July 19 hearing on the same subject were Norman R. Augustine, the Chairman and CEO of Martin Marietta Corporation, Bethesda, MD; Robert W. Galvin, Chairman of the Board of Motorola, Inc. Schaumburg, IL; and Stanley C. Pace, the Chairman and CEO of General Dynamics Corp., St. Louis, MO.

On November 17, 1989, the Committee held a hearing to receive testimony on S. 1379, Senator Dixon's proposed amendments to the DPA. The witnesses included the Honorable John R. Kasich, Member of the U.S. House of Representatives from Ohio; General John R. Guthrie, (U.S. Army Retired), and the former commander of US Army Materiel Command; Dr. Robert B. Costello, formerly the Undersecretary of Defense for Acquisition, and currently with the Hudson Institute in Indianapolis, Indiana; Dr. Lawrence J. Korb, of the Brookings Institution and formerly Assistant Secretary of Defense for Installations and Logistics; Albert W. Moore, the President of the National Machine Tool Builders Association; Jefferson Z. Amaker, the President and Chief Executive Officer of the Leach Corporation, who represented the American Electronics Association; and Paul J. Gross, the Chairman of the Proprietary Industries Association in Glendale, California.

At the request of the Senate Banking and Finance Committees, the Office of Technology Assessment (OTA) researched and drafted a report analyzing American manufacturing technology and suggesting options for improving it. The report, second in a series of three, was entitled "Making Things Better: Competing in Manufacturing." On February 28, 1990, the Committee held a hearing at which this assessment report was formally submitted. John H. Gibbons, the Director of the OTA, testified on the OTA report. He was accompanied by Dr. Julie Gorte, the Project Director for the OTA; and Katherine Gillman, the OTA's Deputy Project Director. Other witnesses at the hearing were Dr. Ian M. Ross, the President of AT&T Bell Laboratories; and Sanford L. Kane, the former President of U.S. Memories, a high-tech research consortium.

In March of 1990, the Committee held three hearings to receive detailed testimony on S. 1379 and S. 2168 bills reauthorizing and amending the DPA. The witnesses at the March 1 heraring were: Dr. Jacques S. Gansler, the Senior Vice President of the Analytical Sciences Corporation, representing the Procurement Roundtable; General Robert T. Marsh, U.S. Air Force (Retired), Chairman, Thiokol Corporation, representing the Air Force Association; Bernard L. Schwartz, Chairman and CEO of the Loral Corporation in New York, a Member of the Defense Policy Advisory Committee on Trade (DPACT) and a member of the Defense Manufacturing Board; and Paul F. Math, the Senior Associate Director for Research, Development, Acquisition, and Procurement of the National Security and International Affairs Division of the U.S. General Accounting Office.

The Committee heard testimony on March 8 from The Honorable Thomas J. Murrin, Deputy Secretary of the Department of Commerce; Jed L. Babbin, Deputy Under Secretary of Defense for Acquisition Planning; and Dr. Allan V. Burman, the Administrator of the Office of Federal Procurement Policy at the Office of Management and Budget. On March 22, the Committee held its final hearing on S. 1379 and S. 2168. Testifying before the Committee were William F. Paul, Executive Vice-President of United Technologies Corporation, representing the Aerospace Industries Association; James L. Koontz, President and CEO of the Kingsbury Machine Tool Association, who represented the National Center for Manufacturing Sciences; David Dudon, the President of Mutual Tool & Die, Inc., who represented the National Tooling & Machining Association; and Dr. Alan Shaw, International Security and Commerce Program, Project Director for OTA's Defense Technology Base Assessment Project.

In summary, the Banking Committee conducted three days of hearings to receive testimony relating to the overall health of the U.S. industrial and technology base as well as to global economic trends and their significance for our nation's future. The Committee also held four separate days of hearings on S. 1379, a bill authorized by Senator Dixon and several other Senators, that contains amendments to the DPA of 1950. Witnesses were also invited to comment on S. 2168, the Administration's proposed amendments to the DPA. Two themes evident in all the DPA hearings were the declining ability of U.S. industry to meet national defense needs for innovation and production and the growing degree of U.S. dependence on foreign suppliers for the procurement of technologies critical to national security. Witnesses emphasized the need to foster investment in segments of the Nation's industrial base and technology base bearing on national security.

The Committee hearings suggested that U.S. industrial competitiveness is being outpaced by the gains of foreign counterparts, and that, as a result, the U.S. defense industrial base and technology base is becoming increasingly dependent on foreign sources for the parts, components, and systems necessary to ensure our national security.

According to November 17, 1989, hearing testimony from General John R. Guthrie [Ret.], former Commander of the U.S. Army Materiel Command:

> There is no longer any disagreement, so far as I am aware, that our defense industrial base, on which we rely for no small part of our overall deterrent posture, is in horrible condition, and it is getting worse as producers from top to bottom of the structure leave the defense business.

During the July 19, 1989, hearing on the DPA and U.S. industrial competitiveness, the first witness, Norman R. Augustine, Chairman and CEO of Martin Marietta Corporation, stated that "our industrial base is being seriously eroded. Productivity growth has lagged, our technological edge is diminishing."

Mr. Augustine also stated that "America's defense arsenal really is the private sector." The testimony heard at each of the Committee's hearings emphasized that the health of the Nation's manufacturing, technological and industrial base is vital to the continuance of a strong defense posture, as well as to its international economic competitiveness. As Dr. John Gibbons testified before the Committee on February 28, "it is now impossible to provide adequately for the nation's security without taking steps to improve the nation's civilian industrial performance as well."

At the Committee's February 28th hearing, the Office of Technology Assessment released its newest report, "Making Things Better: Competing in Manufacturing." This report, initiated to analyze manufacturing technology and discuss policy options for improving it, opened with the declaration that "American manufacturing has never been in more trouble than it is now." Dr. John Gibbons, the Director of the OTA, stated in his testimony before the Committee that "the problem of American manufacturing are deep and systemic, and it will take the combined efforts of government and industry to repair them." The OTA report proposed a broad array of policies to improve our Nation's industrial performance in today's climate of intense international competition. Dr. Gibbons testified that government support can play a crucial role in ensuring that critical technologies make it past the conceptual stage and into the development and production stages where they will have widespread defense and commercial applicability and where they will be competitive with foreign technologies which have long had government support.

Hindrances to the competitiveness of critical American technologies include the lack of technology transfer among companies and high cost for small producers. Funds and effort are often wasted on duplicated work because of the lack of communication between companies, large and small. One technology integral to the development of another may die in the laboratory, simply because of an unawareness on the part of a needy producer that it exists. During the Committee hearing on March 22, James Koontz, representing the National Center for Manufacturing Sciences, stated that:

> Although the U.S. has expended hundreds of billions of dollars in the past decade or more on research, there is no inventory of the intellectual property that might be transferred. It is just sitting there and if you are fortunate enough to chance across some * * * maybe, just maybe you will successfully transfer the technology.

One means for transferring technology generally involves consortia formed between companies and between private and government enterprise. Mr. Koontz further testified that:

> The Government [should] focus on aggressively supporting broad based consortia that can provide both national security and industrial competitiveness * * * [It] must focus on identifying and eliminating barriers that inhibit U.S. companies from collaborating, to develop and transfer technology, manufacture and export market their products.

There is another reason why establishing consortia is so integral to the development of critical, competitive technology. As David Dudon stated on March 22, 1990, in his role as representative of the National Tooling and Machining Association:

> Of the many advantages such an arrangement offers, the most important is alleviating the capital burdens on small owner-operated businesses. Acting alone, many

> small companies find it difficult to upgrade their production facilities but allowed to operate jointly, the U.S. can also reap the benefits that joint ventures now provide to our major trading partners West Germany and Japan.

As he and the other witnesses in the same hearing testified, much of the high-quality innovation and production in the United States' high-technology sector is done by smaller "niche" companies. Sanford Kane, the former President of U.S. Memories, testified on February 28, 1990, that

> The U.S. high-technology sector has always benefitted from the entrepreneurial efforts of small, highly innovative companies. * * * Many of the greatest success stories of the past few years have been by relatively small niche companies that identified in specific need and filled it.

Some companies are hindered by limited access to capital and by high capital costs, sometimes preventing them from pursuing an idea independently. They may abandon projects or ally themselves with foreign firms. As a result, the United States sometimes loses control of technological knowledge and increases its dependence on overseas suppliers. In a discussion during the March 22 hearing, James Koontz, the President and CEO of the Kingsbury Machine Tool Association explained, "It's [because of] the lack of capital, that I can't take the risk any longer. I've got to join forces with foreign competitors to do what I have to do." He supported relaxing antitrust laws to allow domestic companies to form consortia in part as an alternative to joining forces with their international competitors. In this way technological advantages could be retained in the United States instead of shared with, and possibly lost to foreign competitors.

As has become evident in recent years, industry is no longer contained by national boundaries. The United States faces stiff competition industrially, commercially, and militarily, from many determined and well-organized foreign counterparts in nearly every major venture undertaken by public or private industry. Dr. Gibbons acknowledged that "American manufacturers have recognized the need for improvement in quality and productivity, and many are making progress." However, he states: "it is not enough. Our ablest competitors are moving faster, and it will take cooperative efforts on the part of both manufacturers and government to keep up with these competitors. * * * According to Dr. Gibbons, "almost alone among . . . governments, the United States government continues to profess the belief that market mechanisms alone can identify and adequately support promising industries or technologies."

Mr. Augustine testified that two-thirds of the contractors who sell manufactured goods to the Department of Defense (DOD) have left as suppliers to the DOD since 1982. During the same hearing Robert W. Galvin, Chairman of the Board of Motorola, Inc., noted that "many industries vital to our military-industrial base are declining in their ability to compete." Like Mr. Augustine, he noted that the U.S. industrial base has shrunk drastically in the 1980's: "In 1982, there were more than 118,000 companies providing goods to the DOD in the relevant defense sectors. In 1987, only 38,000 companies in those sectors provided such goods." According to Mr. Galvin, this shrinkage is more remarkable in view of the fact that it "occurred at a time when the defense procurement budget increased from $43 billion in 1982 to $81 billion in 1987."

The departure of so many suppliers from the defense business has contributed to increased DOD dependence on foreign sources for the procurement of parts, components, and systems critical to U.S. national security. In his July 11, 1989, testimony Former Secretary of Defense Frank Carlucci stated:

> one could single out any number of areas where the Department of Defense is dependent on foreign imports for critical components * * * when we let our production capabilities deteriorate in one area and become dependent on foreign suppliers, we run enormous risks of falling behind and becoming dependent in other areas as well.

As the number of defense suppliers shrinks, our national security is increasingly at risk of being compromised. During the Committee's March 22nd hearing on the DPA amendments, David Dudon, who represented the National Tooling and Machining Association, stated that: "we are now, in some areas, technologically dependent on other nations to provide parts and components to keep some of our major weapons systems operable." "Such dependencies," according to the March 8, 1990, testimony of Deputy Undersecretary of Defense for Acquisition Planning, Jeb Babbin, "raise the risk that foreign interests may be able to influence U.S. policy by leveraging our need for their products and technology."

Perhaps of even greater concern is the present state of ignorance as to the extent of America's dependence on foreign suppliers. Although a great number of American industry leaders are certain that the U.S. is dependent in certain commercial and defense-related industries, there is no knowledge of exactly what areas those are, or the extent of such dependence on foreign suppliers for key technologies. On March 22, 1990, James Koontz stated before the Committee that:

> It is obvious we have no reliable method of assessing the extent of foreign dependency. * * * Personally, I have attempted to put together a list of commodities that my industry considers vital. * * * The top-of-the-line, state-of-the-art in each of these commodities are foreign sourced.

Government witnesses had similar perceptions. Allan Burman, the new Administrator of the Office of Federal Procurement Policy at OMB, stated in his prepared testimony for the Committee's March 8 hearing that:

> There is no single Government-wide (or even DOD-wide) * * * system for gathering data that routinely and systematically reflects the extent that defense contractors, both prime contractors and subcontractors, are dependent on materials provided by foreign sources * * * [existing] data systems do not * * * include data to identify the source of all the materials and components incorporated into the items procured, which materials and components are criti-

> cal to the national defense, or whether alternative sources or substitutes are available.

In his testimony for the same hearing, the Honorable Thomas Murrin, Deputy Secretary of Commerce, declared that "our knowledge of foreign dependencies is extrapolated from 'perceived' or anecdotal information." He stressed that "numerous studies of the defense industrial base by Government and non-Government organizations have concluded [that] we currently do not have any means for really assessing the extent of foreign dependencies on a broad scale."

Throughout the course of the hearing testimony on the DPA before the Committee, there was broad agreement among the witnesses that the Defense Production Act should be updated in order to help maintain and enhance the U.S. defense industrial and technology base. According to the March 22, 1990, testimony of James Koontz, "we have neglected our industrial base for far too many years. The time has come when we can no longer neglect our manufacturing industries if we wish to reap the benefits of our past defense expenditures, thereby maintaining a secure and free nation and enjoying the socalled 'peace dividend.' "

III.—Major Provisions of S. 1379

TITLE I—AMENDMENTS TO THE DEFENSE PRODUCTION ACT OF 1950

Part A—Declaration of Policy

Section 101. Declaration of Policy

The Defense Production Act of 1950 contains a declaration of Congressional policy regarding the purposes and objectives of the Act and the authorities which it provides. Section 101 of S. 1379 modifies the Act's statement of policy to reflect the themes of the bill's proposed amendments to the Act and to reflect modern circumstances.

First, the Act's declaration of policy has been changed to reflect the basic reality that the "defense industrial base" and the "defense technology base" are not distinct and separate from the Nation's overall industry and technology base. They have come to be a mere subset of, and in many ways are indistinguishable from, the general industrial base. Military production relies increasingly on technologies and processes that have civilian as well as military applications. Accordingly, the Nation's security is directly linked to the well being of the civilian industrial and technology base.

In his statement of the Committee for the hearing on July 11, 1989, Frank C. Carlucci, former Deputy Secretary and subsequently Secretary of Defense, stated: "* * * the capability of our industrial base to support our national security is a function of the overall strength of the U.S. economy, not just the strength of our defense contracting base." At the same hearing, the statement of Dr. Robert B. Costello, formerly Under Secretary of Defense for Acquisition, continued the same theme, noting the "key relationship of the national economy and national security."

Second, the Act's statement of policy has been modified to emphasize that the overall health of the industrial base and technology base affects the Nation's capacity to meet not only the demands of war or national emergency but also peacetime defense requirements. During peacetime, the condition of the industrial base, and especially the technology base, has a direct bearing on the technical capabilities and affordability of our defense systems. For some time, our Nation's defense strategy has relied upon the qualitative superiority of our forces and equipment. This was emphasized during the testimony of both private sector witnesses and representatives of the Department of Defense. During the Committee's July 19, 1989, hearing, Norman R. Augustine, Chairman and CEO of Martin Marietta Corporation, stated: "* * * technology has been the key to our security and to our strategy. The 'technological order of battle' has joined the 'industrial order of battle' as a critical factor in the national security equation. * * *" The same point was made by the Deputy Under Secretary of Defense for Acquisition Planning, Jed. L. Babbin, when he said: "* * * we have chosen to base our deterrence on the superiority of our technology base and the skill and training of our forces." Technological superiority cannot be provided by a stagnant or declining technology base, a condition which many witnesses attributed to numerous segments of the Nation's industrial base.

Our Government originally used the authorities provided by the Defense Production Act of the 1950's to mobilize the U.S. industrial base to meet national emergencies. In recent years our Government has used the Act's authorities to help meet preplanned demands. The amendments made by S. 1379 continue to stress the need to sustain the capabilities of the Nation's industrial base to support national defense, but they put greater emphasis on sustaining the Nation's critical technology base supporting national defense.

Part B—Amendments to Title I of the Defense Production Act

Section 111. Limitation on Actions Without Congressional Authorization

During the mark-up of S. 1379, Senator Gramm offered an amendment to make explicit that no provision of the Defense Production Act provides authority for the imposition of wage and price controls without prior Congressional authorization. This amendment was adopted by voice vote. The Committee notes that the Act currently contains a Title IV, Price and Wage Stabilization, but that title expired on April 30, 1953, and remains dormant in the text of the Act. The amendment would apply to that title, as well as to any provision of the Act.

Section 112. Limitation on the Use of Authority of the Defense Production Act

During mark-up of the bill, Senator Gramm offered an amendment prohibiting the use of the Act to assist in the production of chemical or biological weapons, except in time of war or national emergency either declared by the Congress or upon written authorization of the President. The provision prohibits the delegation of this authority by the President. This amendment was adopted by a voice vote.

The amendment was prompted by a recent situation in which the Department of Defense sought to acquire supplies of two chemical compounds used in the production of so-called binary chemical munitions. Binary chemical munitions are those which make use of two chemical compounds, each of which is separately non-toxic but when combined become lethal. The only U.S. sources of the required chemical compounds declined to sell them to DOD because of long-standing company policies against assisting in the production of chemical weapons. During the course of the controversy, DOD officials issued an order under authority of the Act to compel the firms to make the sales. Such use of the Act's authority was regarded as potentially abusive, and the amendment is designed to prevent such abuses.

Part C—Amendments to Title III of the Defense Production Act

Section 121. Expanding the Reach of Existing Authorization Under Title III

Title III of the Defense Production Act presently authorizes the use of various forms of incentives to encourage the private sector to increase the Nation's productive capabilities in support of national defense needs. The Act authorizes purchases or purchase guarantees and loans or loan guarantees to provide the financial incentives for industry to undertake specifically approved projects. Recently, only the purchase guarantee has been used. Under a Title III project covered by a purchase guarantee, the Government agrees to purchase the output of the project, or a broader production undertaking, if the private sector participant is unable to market the results of the project to the Government, either directly or indirectly. Title III projects may be designed to meet direct requirements of specific agencies, such as one of the Military Services, or of prime contractors (or higher-tier subcontractors) under a contract with the Government.

S. 1379 expands the reach and utility of the authorities provided by Title III in two principal ways. First, the authorities are extended to an expanded class of projects through the use of broadened definitions of the terms "industrial resources" and "materials," and the inclusion of the projects relating to the fostering of a critical technology, as these terms are specified in Section 132 (Definitions) of the bill.

Secondly, to enhance the Act's capacity to address industrial base and technology base problems on a timely basis, the bill increases from $25 million to $50 million the value at which an otherwise eligible Title III project must obtain specific Congressional authorization in order to be funded. This amendment will facilitate use of the Title III authorities to fund larger projects soon after their need has been identified, rather than requiring them to wait through the Congressional authorization cycle.

This provision is not intended to alter current practice regarding the review and approval of individual proposed Title III projects. Presently, each proposed Title III project is subject to several reviews, prior to approval. First, a proposed project must be recommended for approval by its sponsoring agency. Next, the proposed project must obtain the support of the DOD Title III program manager, currently the Air Force. Finally, after review by the Office of Management and Budget, a project would receive formal approval by the Under Secretary of Defense for Acquisition.

In addition, Section 131 of the bill would provide to the President the authority to fund an otherwise eligible project that is in excess of the Act's congressional authorization threshold if a determination is made that such action is promptly required to avert an industrial resource shortfall severely impairing national defense capabilities. To circumscribe this waiver authority, the provision requires the President to exercise this authority personally. Again, any such project would remain subject to the various other reviews, including that by the Office of Management and Budget, prior to receiving funding approval by the President.

Section 123. Defense Production Act Fund

To further enahance the Act's utility, this section of the bill establishes a Defense Production Act Fund as a separate fund within the United States Treasury. This revolving Fund would be initially capitalized through a onetime transfer from the National Defense Stockpile Fund and would create a stable source of funding for Title III projects. During the Committee's hearings, this provision received strong support from both public and private sector witnesses. For example, General John R. Guthrie (U.S. Army, Retired), former Commander of the U.S. Army Materiel Command, expressed unequivocal support. Similarly, the provisions relating to the establishment of a fund were supported by a noted scholar on defense industry, Dr. Jacques S. Gansler of the Analytical Sciences Corporation, who represented the Procurement Roundtable, and Albert W. Moore, President of the National Machine Tool Builders Association. Mr. Moore noted that Title III project funding has for many years been both "anemic and erratic." By contrast, the proposed revolving fund would provide a steady funding source which witnesses suggested would be beneficial. The benefits of a steady funding source for Title III projects also received favorable comment from Thomas J. Murrin, Deputy Secretary of Commerce. Dr. Allan V. Burman, Administrator for Federal Procurement Policy, testifying on behalf of the Administration noted OMB's general concerns about revolving funds, and the leveraging of funds with possible unfunded budget commitments present in Section 123 as introduced. The Committee eliminated all leveraging of funds and believes that the approval process required for Title III projects that are funded from the Defense Production Act Fund should go a long way to resolving OMB's more general concerns about the use of revolving funds.

To allay concerns about any potential abuse of the Fund, the provision includes a number of safeguards. First, to assure full participation by both the authorizing and appropriating committees in the Congress, the provision makes clear that expenditures from the Fund are subject to limitations prescribed by the Defense Production Act, as amended, and to any additional limitations imposed by subsequent approriations acts. Next, the provision also specifies that deposits to the Fund are limited to funds specifically appropriated to the Fund as well as net proceeds from the disposal of industrial resource items obtained as a result of the exercise of a purchase guarantee under the existing authority of Section 303 of the Act. In addition, the total obligational authority of the Fund has been strictly limited to the aggregate of the outstanding purchases guarantees or other financing commitments, less the reasonably anticipated receipts from the sale of industrial resource items obtained with monies from the Fund. Provisions permitting leveraging of the Fund were deleted in response to OMB concerns. Further, the Fund manager is required to provide annual reports to the Congress. Finally, the provision would cap the Fund balance at $250 million, excluding any monies appropriated to the Fund in the current fiscal year. Monies in excess of the $250 million cap at the close of any fiscal year would be returned to the Treasury's general fund.

The initial capitalization of the Defense Production Act Fund would be accomplished by a one-time transfer of $200 million from the unobligated balance of the National Defense Stockpile Transaction Fund. At the close of Fiscal Year 1989, the Stockpile Transaction Fund has an unobligated balance of approximately $650 million. Both the existing National Defense Stockpile Transaction Fund and the new Defense Production Act Fund are industrial preparedness programs aimed at improving the capability of industry to respnd to national defense emergencies.

However, the two programs approach their industrial preparedness missions from substantially different assumptions. The purpose of the National Defense Stockpile is to assure that American industry will have ready access to an adequate supply of critical raw materials in order to meet mobilization requirements in time of war or national emergency. The National Defense Stockpile presumes a lengthy opportunity for industry to expand production, in the model of the industrial mobilization accomplished during the Second World War. It also assumes an industrial base fully capable of substantially expanding its output to make use of raw materials in the stockpile. Testimony received by the Committee supports the position that neither assumption is necessarily valid today.

As previously explaned, our industrial base supporting national defense requirements is not capable of rapid mobilization. Further, modern military scenarios are not premised on having the lengthy opportunities for such industrial mobilization. The Defense Production Act Fund proposes to respond to such changed circumstances by using some of the excess defense preparedness resources to fund carefully selected Title III projects.

Section 124. Offset Policy

Offset requirements have become a "fact-of-life" for most American defense firms seeking to sell to foreign firms or foreign governments. With the exponential growth of offset requirements, Congressional concerns regarding their adverse impacts have likewise grown. Offset agreements can result in the export of technology as well as manufacturing opportunities for the prime contractor and many tiers of subcontractors and component suppliers. Available data indicate that the adverse impacts of offset requirements are falling most heavily on smaller subcontractors and suppliers. Significant erosion of the subcontractor and supplier base threatens to cripple the responsiveness of the Nation's defense industrial base, irrespective of the excess manufacturing capacity currently available at the major prime contractor level.

While the concerns regarding the adverse effects of offsets have been increasing in many quarters, associations representing the major defense contractors continue to urge that restrictive Government regulation regarding offsets will only hamper their ability to export successfully. However, Section 825 of the "National Defense Authorization Act, Fiscal Year 1989," Public Law 100-456, required the President to establish "* * * a comprehensive policy with respect to contractual offset arrangements in connection with the purchase of defense equipment or supplies. * * *" On April 16, 1990, the President announced his Policy on Offsets in Military Exports.

During the Committee mark-up of the bill, Senator Heinz offered an amendment to enact the President's offset policy into law. The amendment was adotped by a voice vote. By legislating the National Policy on Offsets in Military Exports, Congress reinforces the President's policy on offsets on military exports and assures itself a participatory role in the formulation of future modifications.

Section 125. Annual Report on Impact of Offsets

The "Defense Production Act Amendments of 1984," Public Law 98-265, added Section 309 to the Act, which requires the President to prepare and submit to Congress an annual report on offsets. The report is to assess the "impact of offsets on the defense preparedness, industrial competitiveness, employment, and trade of the United States." The provision contemplated the conduct of interagency studies designed to "progressively capture (A) the long-term as well as the short-term effects of offsets (with particular attention to the effects resulting from technology transfer associated with offset agreements); and (B) the direct and indirect effects of offsets on lower tier defense subcontractors and on non-defense industry sectors which may be adversely affected by offsets."

The responsibility for preparing the Section 309 Offset Report was delegated to the Office of Management and Budget (OMB). Within OMB, the requirement is acutally managed by the International Security Affairs Branch within the office of the Associate Director for National Security and International Affairs. The submission pertaining to Fiscal Year 1989 is the last Section 309 Offset Report due under the current authorization.

Just as Congressional concern regarding the adverse impacts of offsets was the driving force leading to the enactment of Section 309 in 1984, the proposed amendments to Section 309 reflect concerns with OMB's management of the reporting requirement and the need to collect better data on offset arrangements. Senator Dixon requested the GAO to review the process used to develop the Section 309 Report for Fiscal Year 1988, "Offsets in Military Exports" (December 1988). This review was undertaken as part of a broader review of defense industrial base issues that was included in GAO's November 1989 report, "Industrial Base: Adequacy of Information on the U.S. Defense Industrial Base" (NSIAD-90-48). Senator Dixon also requested GAO to review the proposed amendments to the the Section 309 offset reporting requirement contained in Section 114 of S. 1379, as introduced.

On April 19, 1990, the GAO issued its report, "Defense Production Act: Offsets in Military Exports and Proposed Amendments to the Act." The report noted that under Exeuctive Order 12521 (June 24, 1989), OMB chairs the Interagency Coordinating Committee which prepares the Section 309 Offset Report. The drafting and coordination process described by the GAO indicates that OMB dominates both the developmental process and the substance of the resulting report. OMB prepared the initial draft report outline and assigns drafting responsibilities to the other participants. Subsequently throughout the process, OMB makes the final determination regarding what is included in the report. The GAO included with its report excerpts from agency letters of "nonconcurrence" with the final report, expressing strong displeasure with the information included in the 1988 report and the process by which the report was prepared. The GAO noted that OMB's interpretation of Section 309 essentially eliminated any possibility that the final report would include alternative or dissenting views from the other members of the Coordinating Committee.

GAO noted that the 1988 report "basically restates the analysis and findings of the three prior reports to the Congress on the impact of offsets using data collected in 1985 for the Coordinating Committee by the International Trade Commission." GAO further noted that the reports did not addresss the "effects of offsets on lower-tier defense subcontractors and on non-defense industry sectors that may be adversely affected by offsets, including effects resulting from technology transfer." The GAO report went on to say that the 1988 Section 309 report's assessment of the impact of offsets on defense preparedness and employment on the basis of economic input-output models is "highly dependent on strong assumptions employed in the analysis."

In commenting on the amendments to the Section 309 offset reporting requirement, GAO strongly urged modifications to facilitate the inclusion of significant differing agency views and conclusions. Section 125, as reported, fully reflects GAO's recommendations.

The GAO report also addressed the potential reporting burden placed on industry in light of the bill requirement to report on any contract for the sale of a weapon system or defense related item to a foreign country or firm if such contract is subject to an offset agreement exceeding $5 million. In 1985, the International Trade Commission collected offset information for the period 1980 to 1984 for the Coordinating Committee's use. Summary data was collected regarding offsets of $2 million or less and detailed information regarding offsets above $2 million. Reports by only 43 firms "captured the universe of U.S. arms exports during the period." A similar minimal reporting burden was found in the review of the 1988 data collection effort. The Bureau of Economic Analysis at the Department of Commerce surveyed military export sales contracts for 1980 through 1987 involving offset agreements with a value of $500,000 or more. Only 36 firms reported one or more contracts over this threshold, which is substantially below the $5 million reporting threshold being proposed. It was estimated by OMB that these 36 firms accounted for 90 percent of all U.S. military exports during the year 1980–1985.

As reported, Section 125 specifies the Secretary of Commerce as the President's "Executive Agent" for carrying out the duties of Section 309 by restructuring the existing requirements of Section 309(b). The proponents of this provision shifting responsibility urge that a more balanced and participatory process can be expected from the Department of Commerce. The proposed amendment adds a new subsection (c) to Section 309, which requires that a notice be furnished regarding any offset agreement exceeding $5 million. The notice requirement is an "after the fact" notice, not a prior approval requirement. The provision does not designate the specific Government official to receive the notice; such designation is left to the implementing regulations. The information submitted pursuant to this provision is accorded protection from public disclosure, unless authorized by the firm providing the information. The amendment adds a new subsection (d) (Contents of the Report) modifying existing procedures relating to the report's preparation as suggested by GAO. This subsection makes clear that any alternative findings or recommendations submitted by an agency participating in the interagency task force shall be included in the Section 309 Report submitted to the Congress. Subsection (e) (Utilization of Annual Report in Negotiations) continues the Act's existing requirement relating to the Report's subsequent use in bilateral and multilateral negotiations to minimize the adverse effects of offsets.

Section 126. Assessment of Subscontractor and Supplier Base

This section of S. 1379 adds a new Section 310 (Assessment of Subcontractor and Supplier Base) to the DPA. It requires an assessment of the impact of offsets on those subsectors of the U.S. economy which have been identified as critical to the development and production of components essential for national defense materiel. It specifies some of the matters to be considered in the assessment and provides for the issuance of policy recommendations in response to such an assessment. Subsection (b) specifies that the report shall be issued biannually, with the first report due by July 1, 1993. The Committee is concerned that while the burden of military offsets falls heaviest upon subcontractors, current reports on offsets yield little information on these tiers of the defense industrial base. This biennial assessment is intended to provide a clearer, more timely picture of the impact of offsets on subcontractors. With improved information, policymakers should be in a better position to develop sensible offset policies and determine appropriate responses to any erosion of industrial capabilities at the subcontractor and supplier levels due to offsets.

Part D—Amendments of Title VII of the Defense Production Act

Section 132. Definitions

The bill amends Title VII of the Act by adding important new definitions.

A. Critical Component

The bill defines a critical component to be a component, system, subsystem or related equipment that is essential to the production, repair, maintenance, or operation of weapon systems or other military items identified by the Secretary of Defense as being essential to the execution of the National Defense Strategy of the United States. The Committee intends that any such component be genuinely essential to the performance of a weapon system that is, in turn, essential to the capacity of U.S. armed forces to fulfill missions contemplated by our national defense strategy. The National Defense Strategy of the United States is a classified document, containing plans for specific contingent military operations which our military planners have devised to address anticipated threats to U.S. national security. A declassified summary document is periodically published by the Executive Office of the President.

B. Critical Technology

The bill defines a critical technology as a technology that appears on the Department of Defense's annual critical technologies plan, or other emerging or dual use technologies that the President designates.

C. Critical Technology Item

The bill defines a critical technology item as a materiel directly employing, derived from, or using a critical technology. By including this definition, the Committee recognizes that certain additional items often are necessary to apply a critical technology to military use. To the extent the critical technology is unable to fulfill its intended national security purpose in their absence, such items should by extension be considered critical as well.

D. Domestic Source

The bill defines a domestic source as a company that performs in the United States or Canada substantially all manufacturing activities *related to the production of a critical component or technology item* and to the extent it uses components made by other companies for this purpose, buys substantially all of them from North American suppliers. The Committee intends through this definition to ensure that substantially all of the activities related to the production of a critical component or technology item take place in North America.

The Secretary of Defense designates critical components and technology items. By definition, such critical items are essential to our capability to wage war; lack of access to them during a conflict would pose a serious threat to national security. During an armed conflict, overseas sources of supply are likely to be more vulnerable than those based in North America. For this reason, the Committee believes it prudent to ensure that such critical items are produced onshore, by North American companies. The Committee wishes to emphasize that the definition of domestic source applies to research and development, engineering, manufacturing, and production activities related to the production of critical components and technology items. It does not concern manufacturing activities related to the production of non-critical components and items.

E. Industrial Resources

The bill adds a new definition of industrial resources, which includes materials, services, processes or manufacturing equipment necessary to establish or maintain an efficient and modern defense industrial capability. The new definition is intended to encompass the full range of processes, technologies and services necessary to maintain our defense industrial capability.

Section 133. Delegation of Authority; Appointment of Personnel

This section amends Section 703 of the DPA, relating to the President's authority under the Act to delegate authority, create agencies, and appoint and fix the compensation of civilian personnel free of the constraints of the Civil Service System.

Due to concerns about the need to ensure accountability, Section 703 has been modified to restrict the President's authority to delegate powers conferred by the Act to individuals appointed with the advice and consent of the Senate. It prohibits further redelegation of Title I authorities and limits redelegation of remaining authorities to civil servants who are members of the Senior Executive Service or military officers below general or flag officer rank.

Section 135. Antitrust Protections for Voluntary Agreements Initiated by the President

This section makes a number of changes to the Act's current limited antitrust protections for "voluntary agreements" initiated by the President with the private sector, as recommended by the Administration's proposed "Defense Production Act Amendments of 1990" (S. 2168). Section 708 of the DPA currently provides an antitrust defense to companies who carry out voluntary agreements "to help provide for the defense of the United States through the development of preparedness programs and the expansion of productive capacity and supply beyond levels needed to meet essential civilian demand in the United States." The President is empowered by Section 708(c)(1) to authorize such voluntary agreements when he finds that "conditions exist which may pose a direct threat to the national defense or its preparedness programs." The provision for voluntary agreements has its roots in our World War II experiences and was a valuable tool in obtaining the help of industry during the Korean War.

Presently, five voluntary agreements are in effect on a standby basis pursuant to Section 708. Four are to facilitate coordination of munitions production, while the fifth establishes a procedure under which owners of oil tankers could make capacity available to transport petroleum products for the Defense Department.

Section 708 was substantially revised in 1975 in conjunction with legislative enactment of Section 252 of the Energy Policy and Conservation Act (EPCA), providing a limited antitrust defense for actions of U.S. companies carrying out voluntary agreements and plans of action which are required to implement U.S. Obligations under the Agreement on an International Energy Program. The 1975 amendments significantly reduced the scope of Section 708 authorities. The amendments in Section 125 are designed to restore the breadth of antitrust protection which existed in 1950, but not alter the procedural safeguards adopted in 1975. The amendments, thus, model the Section 708 antitrust defense on Section 252 of the EPCA. The "Voluntary Agreement and Plan of Action to Implement the International Energy Program," adopted under EPCA Section 252, in which seventeen U.S. companies participate, has been actively used since 1976. The Committee is not aware of any problems arising from these antitrust, authorities. Section 252(h) of the EPCA would continue to preclude use of DPA Section 708 for voluntary agreements in support of the International Energy Program.

Section 135 of S. 1379 also amends Section 708 of the DPA to authorize voluntary agreement participants to develop "plans of action," which would be subject to the approval of the Attorney General and to those aspects of promulgated regulations under DPA Section 708(e) governing antitrust monitoring and record keeping. The amendments also add a new basis for closing to the public meetings of advisory committees established in connection with Section 708 voluntary agreements. Closed meetings may be held to permit consideration of classified information and to protect trade secrets and commercial or financial information and when otherwise specifically allowed by statute.

Finally, the amendments would add a new subsection (o), establishing a breach of contract defense available to firms fulfilling a Presidential request pursuant to a voluntary agreement or plan of action.

Section 137 of S. 1379, which is discussed below, deletes existing Section 708A and replaces it with a new Section 708A providing antitrust protection for industry consortia. The original Section 708A was added to the DPA in 1975 to provide a limited antitrust defense for U.S. oil companies carrying out voluntary agreements and plans of action to implement U.S. obligations under the International Energy Program. According to the Department of Energy, existing Section 708A is now obsolete in all respects but one. It was superseded shortly after its adoption in 1975 by the enactment of Section 252 of the EPCA, which is the exclusive authority for U.S. oil company participation in the International Energy Program. Only subsection (o) remains effective. This subsection continues to deny the antitrust protections of Section 708 to any voluntary agreement relating to petroleum products which "is developed * * * to carry out the purposes of a treaty or executive agreement * * * or to implement a program of international cooperation * * *" In the opinion of the Department of Energy, the continued restriction imposed by subsection (o) of Section 708 leaves the United States without an ability to extend antitrust protection to oil companies which agree to help meet our Nation's obligations to fulfill the United States-North Atlantic Treaty Organization oil supply commitments, the United States-Israel Oil Supply Agreement, or other such international obligations. The deletion of existing Section 708A will rectify this situation.

Section 136. Information on the Defense Industrial Base

Section 136 of the bill directs the President to improve information available on the adequacy of the defense industrial base by implementing certain systematic and continuous data collection and analysis procedures. Virtually every witness testifying before the Committee expressed the concern that a lack of data is a major obstacle to efforts to strengthen the defense industrial base. General Tom Marsh stated, "The first step in addressing foreign dependency has to be to define the extent of the problem, and there is, as acknowledged here today, no system in place to track the source of the resources critical to our weapons systems."

The Committee is concerned that such a system has become increasingly necessary as techology development and manufacturing has globalized during the 1980s and as the United States military reduces its force structure in response to changes in the Soviet Union. To the extent the U.S. builds down its defense posture, our national security will rely increasingly on contingent military capabilities, i.e., our existing industrial and technological potential. It is imperative that we know where our industrial strengths and weaknesses lie in areas of the industrial base that would have to be mobilized to meet a national emergency.

The Department of Defense, Department of Commerce and the Federal Emergency Management Agency currently engage in data collection. However, their efforts are not sufficiently coordinated and comprehensive to supply policymakers with the information they need to identify on a timely basis vulnerable areas of the defense industrial base and to make informed decisions about appropriate responses. Thus far, efforts to collect and analyze data on foreign dependency have been limited to isolated industry studies and pilot programs. Testifying on behalf of the General Accounting Office, Dr. Paul Math stated, "DOD's current ad hoc approach to defense industrial base data collection and analysis can only provide information on general industry sectors and foreign dependencies through special studies. We believe this ad hoc approach is inefficient and of limited effectiveness."

The bill requires the Department of Defense to move beyond ad hoc industry studies and to institute systematic and continuous data collection procedures designed to support the effective administration of Title III authorities. The Committee intends for the Department to build upon existing data collection sources, as appropriate, in order to reasonably limit any added administrative duties required of companies. For example, the Defense Department currently solicits relevant information on DD Form 2139 and the Bureau of Census collects other pertinent data every five years in the Census of Manufacturers. These data collection efforts would require elaboration and improvement in order to satisfy the purposes of this section. DD Form 2139 currently applies only to prime contractors and first-tier subcontractors, and the data it yields are incomplete. Data from the Census of Manufacturers are currently unavailable to the Department of Defense at the level of detail and at such intervals necessary for an adequate assessment of industrial capacity in critical sectors. Similarly, the Committee intends that foreign economic intelligence be integrated into assessments of the defense industrial base and technology base.

The Committee recognizes that instituting a systematic, continuous data collection and analysis procedure will be a major undertaking. In the absence of planning, such an effort may yield a large volume of data, some of which would not be essential to the purposes of this section. For this reason, the Committee recognizes that the President may wish to begin carrying out this section of the bill by focusing data collection efforts on areas of the industrial base that have already effectively received priority designation, including production related to items on the Commanders' in Chief Critical Items List and the critical technologies identified pursuant to section 2508 of Title 10 fo the U.S. Code. Such guidance is not intended to limit the scope of this section.

Section 137. Antitrust Protections for Industry Consortia

Section 137 of S. 1379 deletes existing Section 708A of the DPA, which was enacted to provide antitrust defenses to voluntary agreement participants relating to an international agreement with respect to the allocation of petroleum products. As previously noted, this section was rendered obsolote in 1975 when Congress enacted Section 252 of Public Law 94-163, the "Energy Policy and Conservation Act."

The new Section 708A added to the DPA by Section 137 provides authority and sets forth procedures establishing and operating approved "industry consortia." Such industry consortia are envisioned as joint industry arrangements chartered to undertake a specified program of basic research, research and development, production, or a flexible manufacturing network to provide industrial resources or emerging technologies required for the preservation or enhancement of the industrial or technology base essential to execution of the national defense strategy of the United States. The new section affords the industry consortium with immunities from civil and criminal liability under the antitrust laws (as opposed to mere defenses), provided the consortium is operating with the scope and limitations of its charter and in compliance with all regulations implementing the new statutory provision. No protections are accorded to activities undertaken by an industry consortium operating outside the scope and limitations of its charter. To protect the public, the provision preserves the right of an aggrieved person to bring a civil action to enjoin continued activities by an industry consortium of injurious behavior even within the scope of its charter. An aggrieved party found to be injured by such behavior can recover actual damages.

Subsection (a) provides immunities from criminal or civil action for the activities of an industry consortium operating within the scope of its charter and in conformity with the regulations implementing the new section, except for the remedies made available in subsection (i) of the new section.

Subsection (b) specifies the meaning of terms used in the new Section 708A. Paragraph (1) lists the statutes encompased within the term "antitrust laws." Paragraph (2) defines the term "flexible manufacturing network." Paragraph (3) provides a definition of the term "industry consortium."

Subsection (c) specifies the procedures to be followed in the creation of an industry consortium. The formation of an industry consortium may be initiated by private sector entities, unlike the creation of a voluntary agreement which must be initiated by the President or his designee. The procedures require the publication of a notice announcing the receipt of an application to form an industry consortium, identifying each participating entity, and describing the applicants' proposed activities. A copy of the application is furnished to both the Attorney General and the Chairman of the Federal Trade Commission for review and to obtain the recommendation of each officer regarding whether the applicants should be granted a charter as an industry consortium by the President. The provision also contains a special application procedure for a flexible manufacturing network or other industry consortium composed exclusively of small business concerns, whose aggregate size does not exceed the maximum size limitation for a single "small business concern." Such a small business flexible manufacturing network or industry consortium can furnish notice to the Attorney General of its formation, "self-certify" its compliance with the Act and its implementing regulations, and then continue operations with the antitrust protections afforded by the section unless the Attorney General revokes the self-certification.

Subsection (d) specifies the criteria that an applicant must meet in order to be chartered. The subsection also requires that action be taken on a reviewable application within 90 days of its receipt, but not sooner than 30 days after publication of the required notice announcing the application for a charter. An approved consortium shall be issued a charter, specifying the scope of its activities and imposing such special terms, conditions, or limitations as deemed appropriate by the President. The subsection also requires the appointment of a principal liaison to serve as the point-of-contact between the consortium's leadership and the Government.

Subsection (e) authorizes an industry consortium to form one or more advisory councils.

Subsection (f) provides for the modification and termination of a consortium charter. A charter may be terminated for failure to comply with its terms or the requirements of Section 708A, as amended, and the section's implementing regulations. The termination procedures provide the consortium with an opportunity to appeal a termination notice. The charter may also be voluntarily terminated by the industry consortium.

Subsection (g) provides for the President to issue regulations implementing the new Section 708A. The participation of the Attorney General and the Chairman of the Federal Trade Commission in developing such regulations is specified. The subsection also specifies certain matters to be addressed in the regulations, in addition to such other matters as the President deems appropriate. The provision emphasizes providing maximum "sunshine" on the activities relating to the formation and operation of the industry consortium, while still affording appropriate protection to trade secrets and confidential business information of the participants.

Subsection (h) exempts the activities of an industry consortium and any advisory committee it may establish from the Federal Advisory Committee Act, while subjecting them to comparable "sunshine" provisions specified in the regulations implementing the section.

Subsection (i) specifies the remedies available to an aggrieved party under the new Section 708A. Such aggrieved party may bring a civil action to enjoin the industry consortium from continuing to take the actions which inflicted the injury even those within the scope of its charter, and may be awarded actual damages and the cost of such successful action including reasonable attorney's fees. The provision explicitly states that no protections are accorded to activities undertaken by an industry consortium operating outside the scope and limitations of its charter. To place some limitations on frivolous lawsuits a plaintiff would be liable for the payment of the consortium's cost of defending against a suit, including reasonable attorney's fees, if the court finds that the challenged conduct was within the scope and limitations of the consortium's charter and the requirements of this section, and that the suit was brought for purposes of harassment or was otherwise without any merit.

Section 138. Intelligence Study

The Omnibus Trade and Competitiveness Act of 1988 added a new Section 721 to the Defense Production Act. That section of the DPA authorizes the President or his designee to investigate the effects on the national security of the United States of mergers, acquisitions or takeovers of American companies by foreign persons. It authorizes the President to suspend or prohibit any such acquisition, merger or takeover if there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security of the United States. The 1988 Conference Report on Section 721 stated that the term "national security" was intended to be interpreted broadly and that among the factors to be considered by the President in exercising his authority under the provision was whether domestic production of some items was needed for national defense requirements.

As noted above in this report, the Banking Committee is concerned with the health of the U.S. industrial and technology base which is the foundation of our national security. This concern extends to the potential threat to our national security preparedness posed by foreign domination of key dual use technologies. It is in this connection that foreign acquisitions of American producers of strategic goods becomes an important issue. The Defense Manufacturing Board in its 1989 Annual Report spoke to this issue noting that "while such takeovers can be rejected for security reasons, the increasing overlap of defense and commercial technologies makes it more difficult to pinpoint problematic sales."

President Reagan, by Executive Order 12661, delegated his authority under Section 721 of the DPA to the Committee on Foreign Investment in the United States (CFIUS), and gave the Treasury Department, which chairs CFIUS, the authority to issue implementing regulations. Concerns have been expressed that the Treasury Department and CFIUS have not been fully cognizant of the increasing need to have a broad understanding of the financial and trade strategies of our industrial competitors in order to carry out properly their responsibilities under Section 721.

The General Accounting Office in a March 1990 report entitled "Foreign Investment: Analyzing National Security Concerns" noted that the CFIUS takes a reactive case-by-case approach to exercising its Section 721 responsibilities. It further stated that the CFIUS is not structured to examine other larger questions such as: (1) which industry sectors, technologies, or types of firms to preserve for U.S.

ownership; (2) why foreign investors place more value than U.S. firms do on developing predominance in certain high technology sectors; and (3) what parts of the U.S. defense industrial base are being "hollowed out" as foreign investors acquire U.S. firms which are lower-tier suppliers to the Department of Defense.

The CIA/FBI study proposed in this Section is designed to provide the Congress with a better understanding to the concerns discussed above, so the Congress can adequately oversee executive branch administration of Section 721. A similar 1981 CIA study of acquisitions by the Soviet Union of key Western technologies led to important changes in the export control laws of this country. The CIA/FBI study will also provide needed information to assess the credibility of allegations that foreign governments have directed industrial espionage against U.S. firms to obtain commercial secrets related to critical technologies.

Part G—Reauthorization of Selected Provisions

Section 161. Authorization of Appropriations

This section authorizes the appropriation of the aggregate sum of $250 million to carry out the provisions of Sections 301, 302, and 303 of the Act for fiscal years 1991 through 1993.

Section 162. Sunset

This section amends Section 717 of the Act establishing sunset dates for the authorities granted by various sections of the Act. Subsection (c) of Section 717 eliminates any expiration date for a number of sections of the Act in Title III and Title VII. Within Title III, the following sections of the DPA are given continuous effect: Sections 305, 306, and 308 pertaining to the national policy on offsets and annual report on the effects of offset arrangements; and Section 310 (Assessment of Subcontractor and Supplier Base). Within Title VII, the following sections of the DPA are given continuous effect: Section 705A (Information on the Defense Industrial Base); Section 708A (Industry Consortia); Section 709 (Exemption from the Administrative Procedure Act); Section 710, pertaining to appointments to the National Defense Executive Reserve and other personnel matters; Section 713, specifying the geographical application of the Act's authorities; Section 715, a severability clause; Section 717 (Sunset); and Section 721 (Authority to Review Certain Mergers, Acquisitions, and Takeovers), the so-called "Exon-Florio" provision. The other provisions of Title I, Title III, and Title VII would expire on September 30, 1993.

TITLE II—ADDITIONAL PROVISIONS TO IMPROVE INDUSTRIAL PREPAREDNESS

Part A—Industrial Capability and National Security

Section 201. Industrial Capabilities Assessment

Section 201 of the DPA adds provisions designed to improve the assessment of industrial preparedness in order to assure that defense capabilities are capable of meeting the demands of national defense strategy. The provision requires the President to promptly conduct an Industrial Capabilities Assessment to determine the demands placed upon industry by national defense plans and industry's capabilities to fulfill those expectations during peacetime and times of mobilization.

In its 1988 report entitled "Lifeline in Danger: An Assessment of the United States Industrial Base," the Air Force Association states that: "American industry today is unable to expand its production to meet wartime mobilization needs in less than eighteen months. It is not possible to surge the output of even the most important weapons and war materiel much faster than that." The report also stresses that the U.S. is becoming dependent on foreign sources for critical manufactured goods including some high-technology products essential to defense production.

The Committee believes that a greater degree of integration between national economic policies and national security policies would benefit the national security of the United States by lessening American dependence on foreign suppliers of products critical to national defense and increasing our ability to mobilize in the event of a national emergency. Therefore, the President's Industrial Capabilities Assessment shall include a review of major Government policies and their impact on the defense industrial and technology base in order to modify them to foster industrial innovation, modernization, and productivity.

Part B—Encouraging Improvement of the Defense Industrial Base

Section 211. Recognition of Modernized Production Systems and Equipment in Contract Award and Administration

This section encourages investment in modern industrial facilities and production systems (including hardware and software) by providing for acquisition policies that take into account supplier investments in new facilities and equipment used in the performance of defense contracts.

The provision permits limited reimbursement of contractors for costs incurred in the acquisition of production special tooling, production special test equipment, and production special systems used in the performance of a defense contract. Under Section 2329 of Title 10, United States Code, the amounts reimbursable to a contractor for such production special tooling and test equipment shall not exceed 50 percent of the total costs actually incurred. This provision would permit the "cap" on allowable reimbursements specified in a contract pursuant to 10 U.S.C. 2329 to be exceeded by not more than 10 percent.

The provision also authorizes the contractor to share in any demonstrated cost savings that are attributable to increased productivity resulting from contractor investments not required by the contract.

Section 212. Procurement of Critical Components or Critical Technology Items

This section requires the issuance of a Government-wide procurement policy regarding the use of "on-shore" subcontractors and suppliers in the performance of contracts for: (a) designated critical components essential to the production, repair, maintenance, or operation of essential weapon systems and other items of miltiary equipment; or (b) designated critical technology items. The objective of this provision is to provide to the President an additional tool to preserve the industrial and technology base, especially firms in the subcontractor and supplier base.

Under the procurement policy required by this section, any solicitation for the procurement of a designated critical component or a critical technology item would be required to specify a minimum percentage of content for performance by one or more domestic firms. The provision does not specify a ceiling or a floor for the designated percentage, other than being greater than zero. The domestic source requirement may be fulfilled through the prime contractor's own performance, if the firm is a "domestic source," or through subcontracting with domestic firms. It is anticipated that the focus of the provision's application will be at the subcontractor level, which appears to be showing the clearest and most numerous indications of substantial deterioration.

Virtually all segments of America's manufacturing and technology sectors are reflecting the effects of economic globalization. The effects of this internationalization of technology development, production, and marketing have been especially profound in the aerospace industry and the electronics industry, two of the foundation stones of the Nation's industrial and technology base supporting national defense. While some industry representatives welcome these new challenges for their international marketing potential, others note with alarm the effect of globalization on the extensive network of subcontractors and suppliers. Extensive testimony received during the Committee's hearings as well as the reports from several of the recent assessments of the overall condition of the industrial base supporting national defense made special note of the deterioration of the subcontractor and supplier base, expecially the smaller firms.

A broad and healthy subcontractor and supplier base is essential to the industrial base in broad economic terms as well for national defense. In a very real sense, today's aerospace firms are systems integrators, rather than true manufacturers in the common understanding of that term. The major systems contractors tend to be engaged in assembling the production output of vast arrays of other producers who have furnished everything from major structural segments, to engines, through a whole range of electronic subsystems. It is not uncommon in a modern major weapon system production contract for the prime contractor to subcontract 60 or even 70 percent of the overall production work through a network of subcontractors that may be ten or fifteen tiers deep.

As previously noted, we have a very little systematic data on the overall condition of these multiple tiers of subcontractors and suppliers. But the partial analyses already undertaken, when coupled with increasingly persuasive anecdotal evidence, have convinced many study panels that a significant erosion of the lower-tier subcontractor and supplier base has already taken place and the deterioration may well be accelerating. As more components, assemblies, and subsystems from foreign sources are incorporated into American military equipment, the more dependent our national defense posture becomes on these foreign sources. Plans to surge production of mainline weapon systems, consumables like munitions, or even less complex, but equally important support equipment, becomes highly questionable, without access to all of the necessary components. And, these foreign dependencies are not limited only to the production of military equipment, but extend to their maintenance and operation.

Similar arguments are now being made with respect to the Nation's technology base supporting national defense. Concern is being raised with respect to the overall vitality of the technology base in the United States in light of global pressures. Recent assessments question whether America's technology sector will continue to be able to exploit the potential of scientific breakthroughs or continue to innovate key incremental improvements to existing technology.

In recognition of the concerns about the deterioration of the subcontractor and supplier base, S. 1379, as introduced, contained Section 214 (Procurement of Critical Components) designed to broadly encourage increased use of domestic firms. Section 214 was derived from S. 495, a bill introduced by Senator Heinz. That provision, reported by the Committee as Section 212 of S. 1379, has been substantially modified.

Testimony by Dr. Allan V. Burman, Administrator for Federal Procurement Policy, and Jed L. Babbin, Deputy Under Secretary of Defense for Acquisition Planning, convinced the Committee that existing statutory authority available to the Department of Defense (10 U.S.C. 2304(c)(3)) and the civilian agencies (41 U.S.C. 253(c)(3)) made necessary the Government-wide procurement policy required by subsection (a) of Section 214, as introduced. These statutory provisions were implemented in the Federal Acquisition Regulation (FAR) and became effective on February 3, 1986. FAR Part 6.302-3 (Industrial mobilization; or engineering, developmental, or research capability) does authorize restrictions on prime contract awards for various reasons aimed at preserving the defense industrial base. FAR Part 6.302-3(b)(1)(v), in particular, states that competition may be restricted needed to "create or maintain the required domestic capability for production of critical supplies by limiting competition to items manufactured in the United States or the United States and Canada."

Section 212 as reported is limited to the procurement of designated "critical components" and designated "critical technology items," as those terms are narrowly defined in Section 133 of the bill, as reported. This change is in keeping with the basic focus of S. 1379.

Finally, Section 212, as reported, gives the Secretary of Defense a central role in the practical application of the procurement policy it requires. The responsibility for designating the lists of critical components and critical technology items is entrusted to the Secretary.

Section 213. Sense of the Congress Regarding Encouragement of Investment

This section expresses the sense of the Congress that in order to encourage contractor investment in advanced manufacturing technologies, advanced production equipment, and advanced manufacturing processes to strengthen the Nation's industrial base supporting national defense, the Secretary of Defense should consider two actions during the Department's review of its acquisition process under the Defense Management Review: first, the full cost allowability for contractors' independent research and development bid and proposal activities, and second, an increase in progress payment rates.

Part C—Miscellaneous Provisions

Section 221. GAO Study of State Foreign Investment Incentive Programs

Various policies and practices by the United States in the 1980's, such as our low savings rate and our massive budget and trade deficits, have resulted in our country having less capital than is needed to spur the economic development necessary for an expanding economy and new jobs for our workers. Fortunately, countries which have run trade surpluses with the United States have re-invested some of their dollars back into our country. We have become a capital importing society during the 1980's which has meant increased foreign investment in foreign ownership of our assets.

Since our macroeconomic policies have placed our country in a position where we need foreign investment to ensure continued prosperity, many individual states have set up offices abroad and sponsor incentive programs to attract such investment. States compete for foreign investment through various programs including tax exemptions, industrial bonds, or infrastructure development programs. Concerns have been expressed that while such programs may serve the short term interests of individual states, they may not serve the overall national interests and may not even be needed to attract foreign investment.

Most States, the Committee has been told, do not provide foreign investors greater incentives than they provide domestic investors. However, the Committee understands that the various states do compete to offer foreign investors better incentive programs. As a result, a domestic company in State "A" could be put at a competitive disadvantage with a foreign company in State "B" because State "B" provides the foreign company greater advantages. Such concerns have convinced the Committee that we need a better understanding of the impact on the national interest of the various state incentive programs.

The Committee has, therefore, directed the General Accounting Office to conduct a study of the various state incentive programs used to attract foreign investment. In conducting such a study, the GAO should evaluate the costs and benefits of such state programs, including job creation and economic growth as well as adverse economic effects on United States firms. In addition the GAO is requested to recommend measures the states might take to ensure that the costs of such programs, including tax losses to communities, do not outweigh the economic benefits. Such a report should be presented by the GAO to the Congress within twelve months after enactment of this Section.

Section 222. Discouraging Unfair Trade Practices

This Section provides that a contractor may be subject to a determination of ineligibility for the award of contracts (debarment) if it is found to have engaged in one or more activities specified as unfair trade practices. Such activities are: (1) a violation of intellectual property rights as determined by the International Trade Commission under Section 337 of the Tariff Act of 1930; (2) a violation of an export control agreement, such as the Coordinating Committee on Export Controls, as determined by the Secretary of Commerce; and (3) a knowingly false and material statement regarding certification of foreign content, as determined by the head of the department or agency to which such certificate was furnished. In approving this provision, the Committee intends that serious violations of trade law be an explicit factor weighing against continued eligibility for federal contracts.

TITLE III—AMENDMENTS TO RELATED LAWS

Section 301. Defense Production Act Fund Projects

This provision specifies that the Secretary of Defense, acting through the Under Secretary of Defense for acquisition, shall review and approve projects recommended for funding through the Defense Production Act under the authority of Title III of the Act. Currently, initial review of proposed projects are conducted by an DOD-wide coordinating committee, chaired by the Air Force as the DOD Title III program manager.

It is not intended that this provision would alter current practice which requires a review of proposed Title III projects by the Office of Managment and Budget.

TITLE IV—FAIR TRADE IN FINANCIAL SERVICES

A. Introduction

On May 24, 1990, the Senate Committee on Banking, Housing and Urban Affairs (the "Committee") marked up and ordered to be reported this title, called the Fair Trade in Financial Services Act. The title does not amend the Defense Production Act rather it amends the International Banking Act of 1978, the Securities and Exchange Act of 1934, and the Investment Advisers Act of 1940 in order to encourage foreign countries to offer United States financial institutions that operate or seek to operate in them de facto national treatment. The Committee reported the title for favorable consideration by the Senate on a voice vote with only one vote, that of Senator Mack, recorded as opposing it. The provisions of Title IV were also reported out of Committee as a free standing bill, S. 2028.

B. Purpose of the Title

The United States has for almost half a century offered foreign financial institutions the same competitive opportunities that domestic financial institutions enjoy in our market, regardless of how the parent countries of such foreign institutions treat U.S. financial institutions that seek to operate in them. Many foreign countries do not grant U.S. financial firms de facto national treatment.

The purpose of this title is to encourage those foreign countries to accord de facto national treatment to U.S. banks, brokers and dealers, and investment advisers and to end discrimination against U.S. financial institutions in foreign markets.

C. Summary of Title

This title amends the International Banking Act of 1978, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. The title is intended to encourage foreign countries to offer United States financial institutions that operate or seek to operate in those countries de facto national treatment: i.e., the same competitive opportunities (including effective market access) as are available to those countries' domestic financial institutions.

If foreign countries do not provide U.S. financial institutions with an opportunity to compete, including both de jure and de facto national treatment, the title charges the Treasury Secretary to negotiate to obtain it. To strengthen the Treasury's hand in any negotiations, the title permits U.S. banking and securities regulators, in consultation with the Treasury, to deny applications for regulatory approval filed by banking and securities firms from countries that discriminate against U.S. firms. Such denials would not force foreign financial firms to shrink their existing operations, but could limit their opportunities for future expansion. Before regulators could exercise the authority given them by this title, however, the Secretary of the Treasury would have to publish in the Federal Register a determination that a foreign country was discriminating against U.S. financial institutions by denying them national treatment. This legislation would not require the Secretary to do so. On the contrary such action would be purely discretionary. Once the Secretary made a finding of discrimination against U.S. institutions, banking regulators would consult with the Treasury Secretary in making their judgments on applications for regulatory approval filed by institutions from the country practicing discrimination. This legislation would not require regulators to deny applications for approval. Such action would be within their discretion in consultation with the Treasury Secretary.

D. History of Title

On January 29, 1990, Senators Riegle, Garn, Dixon, Shelby, Graham, Kerry, Bryan, Heinz, D'Amato, Pressler, and Wirth introduced S. 2028, the Fair Trade in Financial Services Act of 1990, an amended version of which is Title IV of this bill. The Senate previously passed legislation similar to Title IV in 1987 as Title XV of S. 1409, the Senate version of which became the Omnibus Trade and Competitiveness Act of 1988, and again as part of S. 1886, the Proxmire Financial Modernization Act of 1988. The House did not adopt those provisions. On April 5, 1990, the Committee held a hearing on Title IV. The witnesses at the hearing were: (1) the Honorable David C. Mulford, Under Secretary for International Affairs, U.S. Department of the Treasury; (2) Mr. David Silver, President of the Investment Company Institute, Washington, D.C.; (3) Mr. Eric Hayden, President of the Investor Bank and Trust Company of Boston, Massachusetts; (4) Mr. Charles Kim, President of the California Center Bank of Los Angeles, California, who represented the

Independent Bankers Association of America; and (5) Mr. Gunter Pauli, Chief Executive Officer, European Services Industries Forum, Belgium, and a member-elect of the European Parliament. As noted above the Committee on May 24 reported out an amended version of S. 2028, both as a separate bill and as Title IV of S. 1379.

E. Background

Recent events have made it clear that a world economy dominated by Cold War confrontation is giving way to one of global market competition. World leadership in such an economy will be based on economic performance. If the United States cannot compete effectively in the new global market, our relative economic strength will decline, as will our capacity for world leadership. It is thus important for our country to consider more carefully the economic and trade implications of policies adopted during the Cold War era to determine whether they remain valid in a new age of global economic competition. The Committee is concerned that wise policies adopted to advance the interests of our nation in a prior age not be adhered to blindly so that they become unwise dogmas that hinder our nation's ability to respond to the challenges of the current period of history.

One area in which the United States is experiencing an increasing competitive challenge is in international banking and finance. During the 1950's and 1960's, U.S. banks dominated the global banking scene as they helped American companies finance their expanding export markets and funded the growth of overseas subsidaries. In the 1970's, as the economies of Europe and Japan fully recovered from the war, many foreign banks also began to do business in the United States as companies from their countries expanded their export markets here. The United States, however, had no national policy dealing with the regulation of foreign banks in this country. As a result American banks rightfully began complaining that foreign banks actually enjoyed competitive advantages in their operations here. For example, foreign banks could branch and take deposits nationwide while the McFadden Act prohibited their American competitors from doing likewise.

F. The International Banking Act of 1978

The Congress responded by passing the International Banking Act of 1978, which established the rules under which foreign banks operate in America. That law was designed to establish a level playing field between American and Foreign banks in this country. It did not discriminate against foreign banks and even grandfathered some of the competitive advantages they enjoyed. The Senate Banking Committee's 1978 report on that statute stated:

> Foreign chartered banks are accorded operating privileges in the United States which enable them to compete in the United States on terms which equal or exceed the domestic operating privileges of our own domestically chartered banks.

The report went on to state that with enactment of the International Banking Act of 1978:

> The United States has more than abided by the principal of national treatment for foreign banks operating here. * * * In contrast our domestic banks operating abroad have not always received equal treatment in foreign countries with their host country competitors.

The report noted that treatment of American banks abroad varied from country to country.

> European Common Market countries have been most receptive to the benefits of competition brought by American Banks to their economies. Japan is a contrast. By the restrictive practices of its officials, American banks are competitively disadvantaged in Japanese banking markets. Not only are American banks limited in their branching abilities, but they are also deterred from soliciting local deposits.

While Congress was concerned in 1978 about the inconsistency between our national treatment policy and the differing policies of some of our competitors, it hoped these matters could be resolved by U.S. negotiators without further Congressional action. It did require the Treasury Department to report to Congress by 1980 on the extent to which American banks were denied national treatment in their banking operations abroad.

In 1978, when the International Banking Act was passed, American banks were still among the largest in the world and controlled the largest share of the international banking market. Two of the three largest banks in the world were American and U.S. banks made over 30 percent of all international loans. Five years later in 1983 U.S. banks still did 27 percent of cross border lending compared to 20 percent for Japan and 31 percent for European banks. But in 1988, U.S. banks did less than 15 percent of cross border lending compared to 38 percent for Japan and 31 percent of Europe. Now the largest U.S. bank ranks only 24th in the world in size.

Foreign banking institutions currently control over 25 percent of all banking assets booked in the United States. Japanese banks alone have 14 percent of all such assets. In some markets, such as California, Japanese banks have 25 percent of total assets. Furthermore, foreign bank loans in the United States are growing three times as fast as domestic bank loans. In contrast the share of banking assets held by American and all other foreign banks in Japan, while never large, has continued to decline. In recent years the U.S. share of the Japanese market has declined from 3 percent to 1 percent. Foreign banks on the whole have less than a 3 percent share of the Japanese market and that too is in decline.

The Committee does not contend that a denial of market access for U.S. financial institutions in key foreign markets is the chief cause of these trends. America's macro-economic policies in recent years have contributed to massive deficits in America's current account balances. This in turn has fueled the growth of foreign banks in this country and has contributed to the new problems U.S. banks now face in international competition. The Committee believes, however, for reasons that will be discussed below that a lack of competitive opportunity for U.S. financial institutions in certain important markets has contributed to these trends. It concluded, therefore, that the U.S. Government must be more aggressive in ensuring U.S. financial institutions are not discriminated against in foreign markets.

G. Implications of the Declining Stature of U.S. Banks

The figures cited above raise concerns about the future growth and health of U.S. financial institutions and also of U.S. exporters who rely on their financing support. Former Federal Reserve Governor Robert Heller stated in May 1988:

> If American banks disengage from the international arena, American businessmen will have to conquer new export markets without an important ally in the form of their own banks. The loss of that extra competitive edge may be costly in terms of foreign sales.

The Banking Committee voiced a similar concern in its report on the International Banking Act of 1978:

> American banks abroad can and should play a significant role in supporting American exports. The Committee is concerned with the uneven treatment accorded to American banks abroad, particularly in contrast with the open reception foreign banks have been given in our domestic market and its consequent effect on our balance of trade.

At a time in our history when American industry must export as never before in order to reverse large and persistent deficits in our current account balance our Government must make sure that our exporters enjoy the support of a competitive international banking sector, that is not impeded by foreign market barriers.

H. The Importance of Access to Foreign Markets

Because U.S. banks are facing such a severe competitive challenge and their continued strength is critical to the health of the U.S. economy, it is important to ensure that their foreign challengers are not achieving some of their success thorugh reliance on unfair trade practices or discrimination in foreign markets. A key concern is fair access for U.S. banks to foreign capital markets that offer lower cost capital than is available in United states markets.

If U.S. access to such markets is limited or denied, the ability of our banks to pursue a global banking strategy and intermediate between markets is restricted, as is access of U.S. borrowers to lower cost funds. If foreign banks, in addition, make use of such funds to penetrate the U.S. market, they will enjoy a unilateral competitive advantage because of the higher profits they enjoy in protected home markets and through their ability to offer lower spreads and lower fees in this country. Under Secretary of the Treasury David Mulford spoke to this issue at the April 5 hearing on Title IV. He stated:

> I have always had the view that one of the reasons we're in the business of opening the Japanese markets and getting them to liberalize their markets is that there is a very low cost of capital there * * * people have begun to look

> at the financial area as one in which the Japanese institutions are engaging in sort of an unfair practice because they work off of a cheap source of capital at home and use that, in a sense to expand their position overseas in much the same way that an industrial company might be accused of an unfair trading practice.

He also stated:

> [W]e have seen an expansion of Japanese institutions on a global basis that is very, very substantial. Where they have external markets, they have often done in the financial business what they do in other businesses, which is to go after market share by offering highly competitive, possibly in some cases, we fear, submarket terms.

Other witnesses at the April 5 hearing also emphasized this point. Mr. David Silver of the Investment Company Institute declared:

> There seems little doubt that foreign firms which develop and grow in the sheltered environment of a restricted market may benefit from the existence of a monopoly or oligopoly in their home market. The profits gleaned from growth in this protected environment may provide a significant boost to entry into another market such as the U.S.

Mr. Charles Kim, representing the Independent Bankers Association of America stated:

> Opening foreign markets may also address part of the reason for the extensive presence of foreign banks in the U.S. Some of these countries operate in a protected home market, subsidizing their activities and ability to increase their U.S. market share, and perhaps allowing them to conduct predator acquisitions.

Likewise, Mr. R. Taggart Murphy, an expert on Japanese financial markets now with Goldman-Sachs in Tokyo, wrote in "Power Without Purpose," an article which appeared in the March-April 1989 edition of the *Harvard Business Review:*

> Japanese commercial and investment bankers have succeeded overseas partly because of their diligence and attention to detail, but also because they can offer lower spreads and lower fees to borrowers thanks to the profits they enjoy from a cartel-like protected market at home.

When asked whether he agreed with Mr. Murphy's analysis on that point Under Secretary of the Treasury Mulford stated:

> I have acknowledged repeatedly, including in my *Financial Times* article of November 29, 1989, that Japanese banks have benefited significantly by interest rate restrictions in Japan. The substantial earnings Japanese banks have acquired in their regulated domestic market have enhanced their ability to pursue market share abroad aggressively.

So it seems clear that the United States has good reason to be concerned whether its financial institutions receive the same opportunities to compete in foreign markets that we grant foreign financial institutions in our domestic market. This is important not only to help exporters of U.S. goods, but also to ensure that our financial institutions do not lose market share at home because foreign firms are able to reserve funding advantages in their own countries to themselves and thus can compete more strongly here. This issue is important for the safety and soundness of our financial system, for if foreign banks use restricted access to cheap deposits or capital to undercut U.S. banks' pricing of loans and services, then U.S. banks are forced to go after higher risk business in order to maintain their profits. This creates increased risks for our deposit insurance funds which are ultimately backed by our taxpayers. The short term interests of consumers of financial services are not always the long term interests of our nation.

I. The National Treatment Standard

The principle of national treatment, as it is embodied in the International Banking Act of 1978, requires the Federal Government to treat foreign banks in the U.S. the same as U.S. banks. As noted above, in passing the 1978 Act Congress asked the Treasury to report on whether U.S. financial institutions receive that national treatment in their operations abroad. The original Treasury report was completed in 1979 and at the request of Congress has been updated twice, most recently in 1986. It was made a permanent quadrennial report in the 1988 Omnibus Trade Bill.

For purposes of the trade bill national treatment report and future financial services negotiations, the Banking Committee in Title IV has defined "national treatment" to make it clear that de jure national treatment reflected in formal laws and regulations is not satisfactory, and that the United States expects de facto national treatment: i.e., an equality of competitive opportunity with domestic financial firms that is not frustrated by opaque or informal practices preventing effective market access. The distinction between de jure and de facto national treatment arises, for example, in the case of Japan. In its 1986 national trreatment update the Treasury stated that "Japan has continued to provide national treatment for foreign banks" but then went on to report that:

> Despite major changes taking place in Japanese financial markets, foreign commercial banks continue to find Japanese markets difficult to penetrate and offering few competitive opportunities * * * the long standing problems foreign banks have had in funding themselves in domestic yen remain. The resulting funding and pricing practices make Japan a relatively uncongenial lending market for foreign banks. Foreign banks' shall share of the loan market has declined modestly in the last three years.

The Treasury report suggested that while Japan gives foreign banks *de jure* national treatment, it does not really offer foreign banks a full opportunity to compete in the Japanese market in the same terms as Japanese firms and thus does not provide *de facto* national treatment.

It was in light of this discrepancy that, even before the 1986 Report, the Treasury began a series of still ongoing negotiations to persuade the Japanese of truly open their financial markets to foreign competition. Under Secretary of the Treasury David Mulford, who has conducted these negotiations on behalf of the U.S. Government, related his own frustration with the results of these talks in a November 29, 1989 article in the Financial Times:

> It is particularly disheartening to see foreign banks and securities firms blocked from offering internationally proven services and products in Japan. * * * Formal legal frameworks apart, foreign firms are also frustrated by opaque informal practices.

Mr. Mulford noted:

> [S]tatutory restrictions and regulatory practices continue to be a firm barrier to full access by foreign firms to the Japanese financial services industry. The situation invites Congressional action and risks exhausting the U.S. Treasury's patience with the low evolution of the past six years.

At the Committee's April 5 hearing on Title IV, Under Secretary Mulford stated that de jure national treatment must be distinguished from de facto national treatment:

> We firmly believe that it is not sufficient simply to remove blatant discriminatory barriers. Foreign firms should effectively enjoy the same competitive opportunities as domestic firms.

In response to a question from Chairman Riegle about whether Japan provides U.S. financial firms national treatment, Under Secretary Mulford stated:

> I have expressed my concern that barriers still exist which effectively prevent foreign firms from playing on a level playing field in Japan. *De jure* national treatment does not always result in *de facto* equality of competitive opportunity.

The title reported by the Committee makes clear that *de facto* national treatment is what U.S. negotiators must seek, and it defines the terms to mean the same competitive opportunities (including effective market access) as are available to another country's domestic financial institutions.

Practices in Japan

While Title IV would give U.S. officials the authority to negotiate for the equality to compete with domestic institutions in all foreign markets, a particular focus of discussion in the hearings and of U.S. Government financial service negotiations has been to seek such treatment in Japan. A range of Japanese domestic banking practices have been cited as having the effect, whether intentional or not, of disproportionately restricting foreign financial institutions and new entrants to Japan's financial markets. The specific Japanese practice that has been most widely cited as denying foreign financial institutions a fair opportunity to compete is the regulation of deposit interest rates. Because of the controls, foreign banks seeking to enter the banking market cannot bid for deposits to establish a deposit base and are disadvantaged in other market sectors by being forced to rely on higher cost funds. Although in the last six years Japan has increased the percentage of deregulated deposits, it continues to regulate many types of bank desposits. Mr. Mulford of the Treasury stated at the April 4 hearing:

> remaining interest rate restrictions should be removed. This would greatly reduce the cost-of-capital advantage Japanese banks enjoy over foreign financial institutions.

Some other Japanese practices that deny foreign firms an equality of competitive opportunity in Japan are:

1. Impediments to developing money market instruments which deny foreign banks an opportunity to fund themselves in domestic yen.

2. Certain laws, regulations, and practices which prohibit Japanese investors from gaining access to foreign markets and impede the entry of innovative foreign products to the Japanese market.

3. Other laws, regulations, and practices which limit the opportunities of foreign firms to manage pension funds and mutual funds in Japan. Speaking on this point Mr. David Silver stated at the April 5 hearing:

> [A]s regards mutual funds, Japan remains a "closed shop" with no movement toward a free market on the horizon.

4. A lack of transparency. Foreign firms are not given fair opportunities to participate in the process by which the Ministry of Finance develops official policies, regulations, and administrative guidance. Some firms claim that it is hard for them to even obtain clear written statements of the rules or policies once they are decided. Furthermore, the bureaucracy is empowered to "interpret" the law as it deems fit creating fears of arbitrary treatment in foreign firms if they question authoritative interpretations by government officials. Mr. Eric Hayden, who represented the Bank of America in Japan for several years, spoke on this issue at the April 5 hearing. He stated:

> [F]oreign financial firms remain frustrated by the lack of transparency in the process by which official regulations, policies, and administrative guidance are developed and implemented by the Ministry of Finance and the Bank of Japan. Clearly written policies remain the exception rather than the norm, thereby ensuring the bureaucracy monumental power to interpret the law as it deems fit, which includes the ability to intimidate financial firms. One phone call is all it takes to make a point and keep the recipient in tow.

This list of practices is only meant to be illustrative and is certainly not an exhaustive description of the type of foreign practices that this title gives our negotiators the authority to address in Japan and other markets where U.S. firms are presently denied equality of competitive opportunity with domestic firms.

K. Unconditional Market Access Versus Reciprocal National Treatment

The Treasury Department prefers to continue the present U.S. policy of unconditional national treatment whereby we take no action against trading partners that discriminate against U.S. firms. In voicing that position, Mr. Mulford admitted that most of our other major trading partners already have or were moving from unconditional national treatment to reciprocal national treatment policies. He noted that Japan is among these countries:

> Japan's banking law does contain language which requires the Minister of Finance, in reviewing a foreign institution's banking license applications to examine whether Japanese banks are entitled to equivalent status in the foreign country.

The European Community (EC) in its Second Banking Directive has adopted a *reciprocal* national treatment standard. Article 9(4) of the final directive adopted on December 15, 1989, permits the EC to retaliate against third countries if its financial institutions "do not receive national treatment offering the same competitive opportunities as are available to domestic credit institutions and the conditions of effective market access are not fulfilled." EC officials have stated that the new Article 9(4) is intended to ensure that the current internationally accepted standard of "national treatment" should work in practice to ensure effective market access in third countries; that is, *de factor* not just *de jure* national treatment. Sir Leon Brittan, Vice President of the European Commission for Financial Services and Competitive Policy, spoke about this in a May 1, 1989, speech in Phoenix, Arizona to the Bankers Association for Foreign Trade. He stated:

> We will only seek to hit back and exclude new banks from third countries entering the community market where there is *de facto* or *de jure* national discrimination against our banks in the third country concerned.

EC officials have acknowledge that their institutions receive *de facto* national treatment in the United States. This does not mean EC officials will refrain from attempting to negotiate an end to structural barriers, such as the Glass-Steagall Act, that make the U.S. financial market more restricted than their own. Article 9(3) of the Second Banking Directive provides for such negotiatons, but article 9(3)—in contrast with 9(4)—does not provide for any action against U.S. banks if the United States retains restrictions such as the Glass-Steagall Act. Sir Leon Brittan likewise spoke to this point in the above noted Phoenix speech. He stated:

> Where our partners have banking laws which are effectively non-discriminatory, but less liberal than our own, that will be a legitimate matter for negotiation. We will be fully entitled to argue that our most liberal banking market sets an example which our major trading partners should follow. But we would not invoke the lack of equivalent treatment as a basis for retaliation. To be very specific, in the case of United States legislation, there will be no

sanctions against U.S. banks in the community because of the Glass-Steagall Act or any other measures which restrict community banks' actiivities here so long as they are genuinely non-discriminatory between domestic and foreign banks.

L. Leverage for Treasury Negotiators

An important issue related to the increasing reliance of other governments on a reciprocal national treatment standard is the extent to which U.S. negotiators are presently at a disadvantage in negotiating market liberalization abroad.

Witnesses at the April 5 hearing strongly supported the passage of this title in order to give U.S. negotiators increased leverage in their efforts to open foreign financial markets. Mr. David Silver of the Investment Company Institute stated:

> Our government should not be obligated to follow a supine policy of granting unconditional national treatment and market access to foreign financial institutions without regard to the treatment of U.S. institutions in the home country of such foreign institutions.

Mr. Eric Hayden, who, as noted above, spent over seven years in Japan working for the Bank of America, declared:

> Our government negotiators have long been at a disadvantage in gaining access for U.S. institutions to foreign financial markets because they lack the power to invoke reciprocity. One of the great frustrations of all of us in the expatriate American banking community in Japan was the realization that any hope of change depended in large part on our ability to persuade the Japanese of the benefits to Japan of such change. It was as obvious to the Japanese as it was to us that, despite the support of our government officials, they had no meaningful levers to use on our behalf.

Mr. Guenter Pauli noted that the European Community had adopted its own reciprocal national treatment provision to give its negotiators increased leverage in their efforts to obtain equality of competitive opportunity in Japan. Based on his own extensive experience working in Japan, Mr. Pauli stated:

> Either you negotiate from a position of strength, or there is no negotiation at all. You end up asking favors. That applies in particular to negotiating with the Japanese for market access.

The title reported by the Committee will allow U.S. negotiators to insist that our financial institutions enjoy an equality of opportunity to compete in another country if institutions from that country want similar treatment here.

M. Applying Sanctions to Firms Currently Operating in the United States

While this title was pending in Committee, concern was raised about whether existing foreign financial institutions in this country should be given a blanket exemption from any possible restrictions on expansion or new articles, even if their home country were found to discriminate against U.S. financial institutions. Such concern was prompted, in part, in consideration that the European Community's Second Banking Directive provides that EC financial institutions owned by U.S. persons will be free to expand their operations in accordance with EC and Member State laws, even if the United States were to change its present policy and fail to offer national treatment to EC financial institutions. While the Committee was sympathetic to the concerns raised about a grandfather for institutions from countries that had a record of open financial markets, it was not anxious to grandfather foreign institutions from countries that had a history of discriminating against entry by U.S. financial firms.

The Committee therefore adopted a compromise amendment at the mark up. The compromise provides that the Secretary of the Treasury and the financial services regulators, in exercising their discretion to administer sanctions under the title, should consider, with regard to institutions already operating in the United States, the parent country's record of providing national treatment to U.S. firms. They are also obligated to consider whether the parent country will permit U.S. banks to expand in that country even if the parent country determined that the Unietd States denied its institutions national treatment. The amendment provides that any further differentiation of treatment between current participants in the U.S. market and new entrants is permissible insofar as it is consistent with achieving the purposes of the Act. It is recognized that some foreign financial firms have made substantial investments in the United States and provide employment opportunities for American citizens. To achieve its market-opening purposes, the bill provides the regulators with the flexibility to restrict new entrants from a foreign country before denying applications from entities operating in the United States.

The compromise amendment also adds a new section setting forth the purposes of the title which are to encourage foreign countries to offer United States financial firms that operate or seek to operate in those countries *de facto* national treatment that offers the same competitive opportunities (including effective market access) that are available to those countries domestic financial institutions, thereby ending discrimination against U.S. financial institutions.

The title reported by the Committee also directs the Treasury Secretary and banking regulators to exercise their discretion under it consistent with any obligations the United States assumes under bilateral and multilateral agreements governing financial services entered into by the President and approved and implemented by the Congress. This provision is meant to apply to chapter 17 of the United States-Canada Free Trade Agreement which deals with financial services, or to an agreement pertaining to financial services similar to what is now being discussed in the Uruguay GATT Round. The provision does not apply to the many treaties of friendship, commerce, and navigation now in effect, even if some such treaties have provisions dealing with financial services.

N. Constitutionality

During his April 5 testimony on the title, Mr. Mulford informed the Committee that the Department of Justice had constitutional concerns about certain provisions which it would address in a separate letter. On April 30, 1990, Bruce Navarro, the Acting Assistant Attorney General for Legislative Affairs wrote to the Committee asserting that the title's negotiation requirements "* * * impermissibly infringe upon the authority of the Executive to conduct negotiations with foreign countries." The letter quoted from *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) to support that contention.

The Committee requested the American Law Division of the Congressional Research Service (CRS) to examine the constitutional concerns expressed by the Justice Department. A CRS memorandum of May 10, 1990, states that the Justice Department's reliance on *Curtiss-Wright* is misplaced and disregards a long history of laws giving negotiating authority to designated officials other than the President. The CRS memorandum confirmed the Committee's belief that the Justice Department's objections lack merit. Copies of the Department of Justice letter and the CRS memorandum are included as appendices to this report.

O. Conclusion

This title adopts a reciprocal national treatment approach to trade in financial services for the United States. This approach reflects the views of the Banking Committee that the United States must be more insistent on equality of competitive opportunity for our financial firms abroad and more aggressive in international negotiations to achieve such equality. The Committee agrees with the thoughts expressed by Deputy Secretary of State Lawrence Eagleburger in a November 30, 1989, speech at the American Foreign Service Association:

> We as a government and as a society are going to have to acknowledge that our economic health and our ability to trade competitively on the world market may be the single most important component of our national security as we move into the next century.

This title is designed as one small step in a series of measures that our nation will have to take to prepare itself for the new age of global economic competition.

TITLE V—EFFECTIVE DATES

This title establishes the effective date for the various provisions of the Defense Production Act Amendments of 1990.

IV.—SECTION-BY-SECTION ANALYSIS

Section 1. Short Title

This section establishes the bill's citation as the "Defense Production Act Amendments of 1990."

Section 2. Congressional Findings

This section enunciates a series of Congressional findings relating to the Defense Production Act of 1950. The first Congressional findings recognizes that the authorities provided by the Defense Production Act are useful in preserving and enhancing the defense industrial and technology base during peacetime, and for mobilizing the Nation's productive capacity to meet national emergencies. The second Congressional finding identifies needed improvements to the Act which will enhance its usefulness to attain its two basic objectives.

Section 3. Table of Contents

This section lists the titles of the bill's provisions in the format of a table of contents.

TITLE I—AMENDMENTS TO THE DEFENSE PRODUCTION ACT OF 1950

Part A—Declaration of Policy

Section 101. Declaration of Policy

This section enunciates a declaration of Congressional policy regarding the purposes of the Defense Production Act of 1950, as amended.

Part B—Amendments to Title I of the Defense Production Act

Section 111. Limitation on Actions Without Congressional Authorization

This section adds a new Section 104 (Limitation on Actions Without Congressional Authorization) to Title I of the Act, making explicit that no effective provision of the Act provides authority for the imposition of wage or price controls without prior Congressional authorization. Title IV (Price and Wage Stabilization) of the Act expired on April 30, 1953, but remains dormant in the text of the Act.

Section 112. Limitations on the Use of Authority of the Defense Production Act

This section adds a new Section 105 (Limitations on the Use of Authority of the Defense Production Act) to Title I of the Act, prohibiting the use of the authorities conferred by the DPA to compel any private person to assist in any way in the production of or other involvement in chemical or biological warfare capabilities except in time of war or in time of a national emergency, as determined by Congress, or upon the written authorization of the President (on a nondelegable basis).

Part C—Amendments to Title III of the Defense Production Act

Section 121. Expanding the Reach of Existing Authority under Title III

Subsection (a) of this section would extend the Act's current loan guarantee authority (provided under Section 301) to a broader class of industrial resources, and to critical technologies, to maintain a strong defense industrial and technology base. To increase the Act's utility to more promptly address industrial base problems as they are identified, the proposed amendments increase from $25 million to $50 million the threshold at which an otherwise eligible project must obtain specific Congressional authorization prior to being eligible for funding under the Act. This provision is not intended to alter current practice regarding the review and approval of individual proposed Title III projects, including the review undertaken by the Office of Management and Budget. The subsection also provides to the President the authority to fund an otherwise eligible project in excess of the Act's authorization threshold, if a determination is made that such action is promptly required to avert an industrial resource shortfall that would severely impair national defense capability. To circumscribe this wavier authority, the provision requires that the President exercise this authority personally.

Subsection (b) makes corrsponding changes to the loan authority currently provided by Section 302 of the Act.

Subsection (c) makes corresponding changes to the purchase and purchase commitment authorities currently provided by Section 303 of the Act. In addition, the amendment reenacts the current text of Section 303(a) to permit the correction of numbering problems and to modernize the subsection's language. Without the amendment, two different provisions are designated as Section 303(a)(1). This subsection also extends the completion date for projects entered into under the current authority of Section 303 of the Act from a fixed date to a date that does not exceed ten years from the date such Title III authority was initially exercised.

Section 122. Sales or Transfers of Excess Industrial Resources

This section modernizes the Act's current provision regarding the disposal of excess industrial resources no longer needed for defense preparedness. It authorizes the disposal of these excess resources by transfer to other Government programs or by sale to the public.

Section 123. Defense Production Act Fund

This section adds to the Act a new Section 304 (Defense Production Act Fund). Subsection (a) of this new section establishes a Defense Production Act Fund ("the Fund") as a separate fund within the United States Treasury. Subsection (b) specifies the sources of funds that may be deposited into the Fund, subsequent to its creation. These deposits are limited to funds appropriated to the Fund and the net proceeds from the disposal of industrial resource items obtained as a result of the exercise of a purchase guarantee under the existing authority of Section 303 of the Act. Subsection (c) of new Section 304 specifics that monies from the fund may be used to carry out activities authorized by the provisions of Title III of the Defense Production Act. It also make the expenditure of monies from the Fund subject to limitations prescribed by the Act, as amended, and to such additional limitations included in any subsequent appropriations act. Subsection (d) recognizes the Fund as a revolving fund without fiscal year limitation. Subsection (e) of the new section caps the Fund balance at $250 million, excluding any monies appropriated to the Fund in the current fiscal year. Monies in excess of the $250 millon cap at the close of any fiscal year shall be returned to the Treasury's general fund. Subsection (f) prescribes the duties of the Fund manager, who shall be designated by the Secretary of the Treasury. These duties include the preparation and submission of an annual report to the Congress. And finally, subsection (g) of new Section 304 specifies the manner in which the Fund Manager will calculate the liabilities outstanding against the Fund. The total obligational authority of the Fund is strictly limited to the aggregate of the outstanding purchase guarantees or other financing commitments, less the reasonably anticipated receipts from the sale of industrial resource items obtained with monies from the Fund.

Subsection (b) initially capitalizes the Defense Production Act Fund by the transfer of $200 million from the unobligated balance of the National Defense Stockpile Transaction Fund. At the close of Fiscal Year 1989, the Stockpile Transaction Fund had an unobligated balance of approximately $650 million.

Section 124. Offset Policy

This section specifies a National Policy on Offsets in Military Exports. Section 825 of the "National Defense Authorization Act, Fiscal Year 1989," Public Law 100-456, required the President to establish "* * * a comprehensive policy with respect to contractual offset arrangements in connection with the purchase of defense equipment or supplies * * *" On April 16, 1990, the President announced his Policy on Offsets in Military Exports. This provision enacts that policy, without change, into law.

Section 125. Annual Report on Impact of Offsets

This section amends Section 309 of the Defense Production Act, which requires the President to annually prepare and submit a report on the impact of offsets on defense preparedness, industrial competitiveness, employment, and trade to the Senate and House Banking committees. The proposed amendment specifies the Secretary of Commerce as the President's "Executive Agent" for carrying out the duties of Section 309. The proposed amendment restructures the existing requirements of Section 309(b), while adding specific reference to the Secretary of Commerce as the Executive Branch official exercising leadership and direction in the process of developing the required report. The proposed amendment adds a new subsection (c) to Section 309, which requires that a notice be furnished regarding say offset agreement exceeding $5 million. The notice requirement is an "after the fact"notice, not a prior approval requirement. The provision does not designate the specific Government official to receive the notice; such designation is left to the implementing regulations. The information submitted pursuant to this provision is accorded protection from public disclosure, unless authorized by the firm providing the information. The proposed amendment adds a new subsection (d) (Contents of the Report) modifing existing procedures relating to the report's preparation. This subsection makes clear that any alternative findings or recommendations submitted by an agency participating in the interagency task force shall be included in the report. Subsection (e) (Utilization of Annual Report in Negotiations) continues the existing requirements of Section 309 of the Act relating to the report's subsequent use in bilateral and multilateral negotiations to minimize the adverse effects of offsets.

Section 126. Assessment of Subcontractor and Supplier Base

This section adds to the Act a new Section 310 (Assessment of Subcontrator and Supplier Base). Subsection (e) requires an assessment of those subsectors of the U.S. economy which have been identified as being critical to the development and production of components essential for national defense materiel. It specifies some of the matters to be considered in the assessment. Subsection (b) specifies that the report shall be issued biannually, with the first report being due by July 1, 1993.

Part D—Amendments to Title VII of the Defense Production Act

Section 131. Small Business

This section amends Section 701 of the Act pertaining to assuring small business participation in the programs authorized. As amended, subsection (a) would specify the objective of assuring the maximum practicable opportunity for the participation of small business concerns in the various programs to strenthen the defense industrial and technology base. The provision makes clear that such participation must be afforded at both the prime contractor level and the various levels of subcontractor activity, including suppliers. Subsection (b) of the revised Section 701 would continue the existing policy that the regulations implementing the various programs authorized by the Act should accord small business concens expeditious handling of their applications, requests, or appeals. Subsection (c) continues the Congressional direction to the President, currently reflected in Section 701, that small business concerns must be accorded their fair share of materials if the allocation authority of Section 101 of the Act is implemented.

Section 132. Definitions

This section offers a substantially revised Section 702 of the Act, specifying definitions of various terms. Paragraph (1) adds a definition of "critical component." Paragraph (2) adds a definition of "critical technology." Paragraph (3) adds a definition of "critical technology item." Paragraph (4) sets forth the Act's current definition of "defense contractor," modified to reflect terminology defined in this section and used throughout the proposed amendments to the Act. Paragraph (5) adds a definition of "domestic source." Paragraph (6) sets forth a stylistically modified version of the Act's current definition of "facilities." Paragraph (7) adds a new definition of "industrial resources," intended to continue the Act's reach of activities presently covered and broaden that reach to additional areas, especially regarding the full range of processes, technologies, and services relating to the use of modern manufacturing equipment. Paragraph (8) sets forth a broadened version of the Act's current definition of "materials." The intent is to capture the full range of materials from those in the raw, unrefined state through manufactured items that serve as components to defense materiel, to items of defense materiel themselves. The definition has been broadened to include advance processed materials, such as composites and ceramics. Paragraph (9) includes a slightly modified verison of the Act's current definition of "national defense." Specifically, the definition's reach has been extended by substituting the word "energy" for the more limiting term "atomic energy." Paragraph (10) adds a new definition of "nondomestic source." Paragraph (11) sets forth a revised version of the Act's current definition of person to exclude any reference to the Federal Government. Paragraph (12) adds a revised definition of "services," which expands its reach to include the full range of service activities supporting the development, production, or utilization of an industrial resource or a critical technology item. It also includes the construction of related facilities, as does the current definition.

Section 133. Delegation of Authority; Appointment of Personnel

This section offers a modernized version of the Act's current Section 703, relating to the President's authority under the Act to delegate authority, create agencies, and appoint and fix the compensation of civilian personnel free of the constraints of the Civil Service System. Section 703 is also amended regarding delegations by the President of the various authorities conferred by the Act and any further redelegation of those authorities. The authorities conferred upon the President by the Act may be delegated only to a civilian officer of Government appointed with the advice and consent of the Senate. Except for the authorities conferred by Title I of the Act, further delegation of those authorities by such Senatorially-confirmed officer is limited to civil servants who are members of the Senior Executive Service or to military officers of general or flag officer rank. No redelegation of the authorities conferred by Title I is authorized by any Senatorially-confirmed civilian officer.

Section 134. Rules, Regulations, and Orders

This section offers a simplified version of the Act's current Section 704, relating to regulatory implementation of the Act's authorities.

Section 135. Antitrust Protections for Voluntary Agreements Initiated by the President

This section makes a number of changes to the Act's current limited antitrust protections for "voluntary agreements" initiated by the President with the private sector. These provisions include a modernized definition of "antitrust laws" and a definition of the term "plan of action." The provision in several instances extends limits on public disclosure of the activities of the participants to a voluntary agreement in order to protect classified information, trade secrets or confidential business information. The antitrust protections afforded by the Title VII of the Act are extended to "plans of action" adopted to implement an approved voluntary agreement. The provision also affords a defense against a breach of contract action if such breach of contract was "caused predominantly by action taken during an emergency to carry out a voluntary agreement or plan of action authorized and approved in accordance with this section." The provision does not include the blanket waiver from the requirements of the Federal Advisory Committee Act, as contained in the Administration's proposal.

Section 136. Information on the Defense Industrial Base

This section add to the Act a new Section 705A (Information on the Defense Industrial Base). This provision requires the President to implement a "systematic, continuous procedure to collect and analyze information necessary to evaluate the adequacy of industrial capacity and capability in items and technologies essential to the execution of the National Defense Strategy of the United States." The provision calls for improving the application of information derived from the periodic Census of Manufacturers undertaken by the Bureau of the Census. The provision also calls for improved information regarding the extent of foreign dependencies in components and technologies deemed essential to defense production, with particular attention being directed to subcontractors and suppliers. Subsection (c) of this amended Section 705A provides a separate authorization for appropriations for these activities to improve information collection and analysis relating to the industrial and technology base supporting national defense.

Section 137. Antitrust Protections for Industry Consortia

This section offers a substitute for Section 708A of the Act, which currently provides antitrust defenses to certain voluntary agreements relating to an international agreement with respect to the allocation of petroleum products. The section is unnecessary in light of the enactment of Section 252 of Public Law 94-163, the "Energy Policy and Conservation Act," on December 22, 1975, and the proposed amendments to Section 708.

The proposed amendment to Section 708A provides authority and procedures to establish and operate "industry consorita." Such industry consortia are envisioned as joint industry arrangements chartered to undertake a specific program of basic research, research and development, production, or a flexible manufacturing network to provide industrial resources or emerging technologies required for the preservation or enhancement of the industrial or technology base essential to the execution of the national defense strategy of the United States. The new section affords the industry consortium with immunities from civil and criminal liability under the antitrust laws (as opposed to mere defenses), provided the consortium is operating within the scope and limitations of its charter, and in compliance with all regulations implementing the new statutory provision. No protections are accorded to activities undertaken by an industry consortium operating outside the scope and limitations of its charter. To further protect the public, the provision preserves the right of an aggrieved person to bring a civil action to enjoin further activities by the industry consortium of injurious behavior within the scope of its charter. Judicial remedy for an aggrieved party found to be injured by such behavior is limited to an award of actual damages.

Subsection (a) (Antitrust Protection) of the proposed new Section 708A provides immunities from criminal or civil action for the actions of an industry consortium operating within the scope of its charter and in conformity with the regulations implementing the new section, except for the remedies made available in subsection (i) of the new section.

Subsection (b) (Definitions) specifies the meaning of terms used in the new Section 708A. Paragraph (1) lists the statutes encompassed within the term "antitrust laws." Paragraph (2) defines the term "flexible manufacturing network." Paragraph (3) offers the definition of the term "industry consortium."

Subsection (c) (Formation of Industry Consortium) of the proposed new Section 708A specifies the procedures to be followed in the creation of an industry consortium. The formation of an industry consortium may be initiated by private sector entities unlike the creation of a voluntary agreement which must be initiated by the President or his designee. The procedures require the publication of a notice announcing the receipt of an application to form an industry consortium, identifying each participating entity, and describing the applicants' proposed activities. A copy of the application is furnished to both the Attorney General and the Chairman of the Federal Trade Commission for review and to obtain the recommendation of each officer regarding whether the applicants should be granted a charter as an industry consortium. The provision also contains a special application procedure for a flexible manufacturing network or other industry consortium composed exclusively of small business concerns, whose aggregate size does not exceed the maximum size limitation for a single "small business concern." Such a small business flexible manufacturing network or industry consortium can furnish notice to the Attorney General of its formation and "self-certify" its compliance with the Act and its implementing regulations, and continue operations with the antitrust protections afforded by the section until challenged by the Attorney General.

Subsection (d) (Criteria for Approving Consortium) of the new Section 708A specifies the criteria that an applicant must meet in order to be chartered. The subsection also requires that action be taken on a reviewable application within 90 days of its receipt, but not sooner than 30 days after publication of the required notice announcing the application for a charter. An approved consortium shall be issued a charter, specifying the scope of its activities and imposing such special terms, conditions, or limitations as deemed appropriate by the President. The subsection also requires the appointment of a principal liaison to serve as the point-of-contact between the consortium's leadership and the Government.

Subsection (e) (Consortium Advisory Council) of the proposed new Section 708A authorizes an industry consortium to form one or more advisory councils.

Subsection (f) (Charter) of the new Section 708A provides for the modification and termination of a consortium charter. A charter may be terminated for failure to comply with its terms or the requirements of Section 708A, as amended, and its implementing regulations. The termination procedures provide the consortium with an opportunity to appeal a termination notice. The charter may also be voluntarily terminated by the industry consortium.

Subsection (g) (Regulations) requires the President to issue regulations implementing the new Section 708A. The participation of the Attorney General and the Chairman of the Federal Trade Commission is specified. The subsection also specifies certain matters to be addressed in the regulations, in addition to such other matters as the President deems appropriate. These emphasize providing maximum "sunshine" on the activities relating to the formation and operation of the industry consortium, while still affording appropriate protection to trade secrets and confidential business information of the participants.

Subsection (h) (Exemption from Federal Advisory Committee Act) of the new Section 708A exempts the activities of an industry consortium and any advisory committee it may establish from the Federal Advisory Committee Act, while subjecting them to the "sunshine" provisions specified in the regulations implementing the section.

Subsection (i) (Remedies) specifies the remedies available to an aggrieved party under the new Section 708A. An aggrieved party may bring a civil action to enjoin the industry consortium from continuing to take the actions which inflicted the injury even those within the scope of its charter, and may be awarded actual damages and cost of such successful action including reasonable attorney's fees. No protections are accorded to activities undertaken by an industry consortium operating outside the scope and limitations of its charter. A plaintiff shall be liable for the payment of the consortium's cost of defending against a challenge, including reasonable attorney's fees, if the court finds that the challenged conduct was within the scope and limitations of the consortium's charter and the requirements of this section and that the action was brought for purposes of harassment or was otherwise without merit.

Section 138. Intelligence Study

This section requires the Central Intelligence Agency in cooperation with the Federal Bureau of Investigation to periodically undertake a review of foreign investment patterns to determine the existence of any coordinated strategy by foreign governments or foreign firms concerning the acquisition of U.S. companies involved in critical technologies, and any industrial espionage activities directed at U.S. firms by foreign governments. A report regarding the findings of these reviews shall be furnished to the Congress within one year from the date of enactment, and each four years thereafter.

Section 139. Exemption from Administrative Procedure Act

This section amends Section 709 of the Act, which exempts regulations implementing the Act from the notice and comment provisions of the Administrative Procedure Act, but requires publication of an agency statement that interested parties were consulted in the formulation of the regulation. The proposed amendment to Section 709 would similarly exempt the Act's implementing regulations from the notice and comment provisions of the Administrative Procedures Act. It would, however, make any regulation subject to the publication and comment procedures, as required by Section 22 of the Office of Federal Procurement Policy Act, to assure adequate public review and participation in rulemaking.

Part E—Technical Amendments

Section 141. Priorities in Contracts and Orders

This section eliminates obsolete reporting requirements, while maintaining essential elements of the Presidential findings that must accompany the use of title I authority regarding priority performance of contracts or the allocation of materials.

Section 142. Loan Guarantees

This section substitutes the current titles for the appropriate committees of the Congress to which the Presidential certification must be submitted pursuant to Section 301(e)(B).

Section 143. Investigations; Records; Reports; Subpoenas

This section amends Section 705 of the Act to correct a spelling error and renumbers subsections to accommodate a previously repealed subsection. The section also increases the fine specified in subsection (d) of the Section 705 (from $1,000 to $10,000) to parallel the fine specified in subsection (e), and elsewhere in the Act. Finally, the section deletes the provision according confidentiality to data obtained by the Office of Price Stabilization prior to April 30, 1953 under the Act's authority.

Section 144. Employment of Personnel

This section amends Section 710 of the Act relating to the appointment of individuals from industry to serve without compensation in defense mobilization positions. The amendments clarify and simplifies the Section's current reporting requirements relating to identifying the financial interests of such persons that could create a conflict of interest relating to the exercise of advisory responsibilities to Government. In addition, the section corrects certain references to organizations of the Executive Branch and Legislative Branch. Finally, the section substitutes the currently applicable language authorizing the payment of travel and per diem.

Section 145. Authorization of Appropriations

This section amends Section 711 by eliminating the reference to the Bureau of the Budget and substitutes the Office of Management and Budget.

Part F—Repealers and Conforming Amendments

Section 151. Synthetic Fuel Action

This section repeals Section 307 of the Defense Production Act of 1950 (50 U.S.C. App. 2097). This provision specifies the procedures under which the Senate and House of Representatives will consider a resolution disapproving Presidential action regarding certain matters defined as "synthetic fuel actions." The veto of an action by the Executive through the disapproval of a single house of the Congress was declared unconstitutional in *Immigration and Naturalization Service* v. *Chadha,* 103 U.S. 2764 (1983).

Section 152. Authorization of Appropriations

This section repeals Section 711(b) of the Defense Production Act of 1950 (50 U.S.C. App. 2160(b)). This section provided for certain payments of interest to the Treasury on the funds obligated as loans under the authority of Section 302 of the Act or purchase commitments under the authority of Section 303 of the Act.

Section 153. Joint Committee on Defense Production

This section repeals Section 712 of the Defense Production Act of 1950 (50 U.S.C. App. 2162). This section establishes and specifies the jurisdiction and rules of the Joint Committee on Defense Production. Such a joint committee is no longer provided for by Standing Rules of the Senate or of the House of Representatives.

Section 154. Persons Disqualified for Employment

This section repeals Section 716 of the Defense Production Act of 1950 (20 U.S.C. App. 2165). The provision disqualifies from employment any individual who advocates (or belongs to an organization that advocates) the overthrow of the United States Government by force or violence, or who engages in a strike against the United States Government (or belongs to an organization that asserts the right to strike against the Government). The provision also establishes penalties of fines (not more than $1,000) and imprisonment (not more than one year) for any individual, so disqualified, who accepts employment and wages authorized under the Act. This provision is duplicative of other generally applicable provisions of law on the same subject.

Section 155. Feasibility Study on Uniform Cost Accounting Standards; Report Submitted

This section repeals Section 718 of the Defense Production Act of 1950 (20 U.S.C. App. 2167). The study required by the section was completed and submitted to the Congress in 1968.

Section 156. National Commission on Supplies and Shortages

This section repeals Section 720 of the Defense Production Act of 1950 (20 U.S.C. App. 2169). The Commission established by this section completed its work in 1976, and was terminated on March 31, 1979.

PART G—REAUTHORIZATION OF SELECTED PROVISIONS

Section 161. Authorization of Appropriations

This section authorizes the appropriation of the aggregate sum of $250 million to carry out the provisions of Sections 301, 302, and 303 of the Act for fiscal years 1991 through 1993.

Section 162. Sunset

This section amends Section 717 of the Act establishing sunset dates for the authorities granted by various sections of the Act. Most of the authorities granted by Title I, Title III, and Title VII are set to expire on September 30, 1993. These authorities are currently authorized through August 10, 1990, by Public Law 101-137.

TITLE II—ADDITIONAL PROVISIONS TO IMPROVE INDUSTRIAL PREPAREDNESS

Part A—Industrial Capability and National Security

Section 201. Industrial Capabilities Assessments

Subsection (a) of this section specifies a statement of policy regarding the greater integration of national economic policies (including tax and trade) and national security policies.

Subsection (b) of this section directs the President to conduct an Industrial Capabilities Assessment to analyze the demands to be placed upon industry by national defense plans and industry's capabilities to fulfill those expectations in peacetime as well as in time of national emergency.

Subsection (c) specifies some of the matters to be addressed in the assessment. It includes the conduct of one or more simulated exercises to assess industry's capability to respond to mobilization requirements. This subsection recognizes the graduated mobilization response system implemented by DOD. This improved mobilization response system is an outgrowth of the 1988 analysis of the defense industrial and technology base conducted by the Office of the Under Secretary of Defense (Acquisition), reported in "Bolstering Defense Industrial Competitiveness."

Part B—Encouraging Improvement of the Defense Industrial Base

Section 211. Recognition of Modernized Production Systems and Equipment in Contract Award and Administration

This section encourages investment in modern industrial facilities and production systems (including hardware and software) through acquisition policies that will provide recognition in contract award decisions and contract administration actions if the contractor, subcontractor, or supplier invests in any such modern industrial facilities, production systems, or other modern production equipment for use in the performance of such contract.

The provision permits the reimbursement of a contractor for additional amounts of the costs incurred for the acquisition of production special tooling, production special test equipment, and production special systems. Under Section 2329 of Title 10, United States Code, the amounts reimbursable to a contractor for such production special tooling and test equipment shall not exceed 50 percent of the total costs actually incurred. This provision would permit the "cap" on allowable reimbursements specified in a contract pursuant to 10 U.S.C. 2329 to be exceeded by not more than 10 percent.

The provision also allows the contractor to share in any demonstrated cost savings that are attributable to increased productivity resulting from contractor investments not required by the contract.

Section 212. Procurement of Critical Components or Critical Technology Items

Subsection (a) of this section provides for the issuance of a Government-wide procurement policy to assure some participation by "on-shore" suppliers in contracts for the procurement of specially designated critical components essential to the production, repair, maintenance, or operation of essential weapon systems and other items of military equipment, and of designated critical technology items. The objective of the provision is to maintain some domestic capability relating to the production of critical components and for the development and production of items directly employing, derived from, or otherwise utilizing a designated critical technology. The provision adopts the definition of "domestic source" added to the Act by Section 132 (Definitions) of the bill. This definition makes the distinction between "domestic source" and "nondomestic source" on the basis of the site of contract performance and not on the basis of who owns the firm performing the contract. This definition also explicitly adopts current policy which recognizes Canadian firms as part of the defense industrial base of the United States.

Under the procurement policy to be issued pursuant to this subsection, each contract solicitation for the procurement of a designated critical component or critical technology item would have to specify a minimum percentage of total cost for performance by one or more domestic firms. This requirement can be met directly by the prime contractor, if such firm meets the definition of a "domestic source," or by subcontracting with domestic firms.

The procurement policy envisioned by this section would also require that the criteria for evaluating offers received from competing contractors would give significant recognition to the amount by which any offeror proposed to surpass the minimum percentage of participation by domestic firms specified in the contract solicitation. The weight accorded to the "source selection factor" for participation by domestic firms is to be the equivalent of "ten percent" or less of the total of the values assigned to all the evaluation criteria announced in the solicitation.

Subsection (a) also provides some specific direction relating to the administration of any subcontracting plan if the requirement for the participation of domestic firms were being met through subcontract activity as opposed to prime contractor performance.

Subsection (b) of this section requires the Secretary of Defense issue a list of critical components or critical technology items, which would be subject to the requirements of the procurement policy required to be issued pursuant to subsection (a).

Subsection (c) provides the appropriate cross-references to the definitions of "domestic source", "critical components," and "critical technology items" added to Section 702 of the Act by Section 132 (Definitions) of the bill.

Section 213. Sense of the Congress Regarding Encouragement of Investment

This section expresses the sense of the Congress that contractor investment in advanced manufacturing technologies, advanced production equipment, and advanced manufacturing processes should be encouraged to strengthen the Nation's industrial base supporting national defense. Specifically, the Secretary of Defense is strongly encouraged to consider two actions during the Department's review of its acquisition process under the Defense Management Review. One recommended action to encourage contractor investment relates to providing for full cost allowability for contractors' independent research and development efforts and their bid and proposal activities. The second recommended action would be to increase in progress payment rates.

Part C—Miscellaneous

Section 221. GAO Study of State Foreign Investment Incentive Programs

This section requires the GAO to conduct a study of the various incentive programs used by the several States to attract foreign investments. The provision calls upon GAO to assess the costs and benefits of such programs with respect to job creation and economic growth as well as potential adverse effects on domestic firms. A report on the GAO's assessment is due to the Congress not later than 12 months after the date of enactment.

Section 222. Discouraging Unfair Trade Practices

This section provides that if a contractor is found to have engaged in one or more activities specified as unfair trade practices, such contractor may be subject to a debarment proceeding which could result in a determination of the firm's ineligibility for the award of contracts. The unfair trade practices enumerated in subsection (b) are: (1) a violation of intellectual property rights as determined by the International Trade Commission under section 337 of the Tariff Act of 1930; (2) a violation of an export control agreement such as the Coordinating Committee on Export Controls (COCOM), as determined by the Secretary of Commerce; and (3) a knowingly false statement regarding certification of foreign content as determined by the head of the department or agency to which such certificate was furnished.

TITLE III—AMENDMENTS TO RELATED LAWS

Section 301. Defense Production Act Fund Projects

This provision specifies that the Secretary of Defense, acting through the Under Secretary of Defense for Acquisition, shall review and approve projects recommended for funding through the Defense Production Act under the authority of Title III of the Act. Currently, initial review of proposed projects are conducted by an DOD-wide coordinating committee, chaired by the Air Force as the DOD Title III program manager.

It is not intended that this provision would alter current practice which requires a review of proposed Title III projects by the Office of Management and Budget.

TITLE IV—THE FAIR TRADE IN FINANCIAL SERVICES ACT OF 1990

Section 401. Short Title

This section designates this title as the "Fair Trade in Financial Services Act of 1990."

Section 402. Effectuating the Principle of National Treatment for Banks and Bank Holding Companies

This section adds a new section 15 to the International Banking Act of 1978, establishing a framework of negotiations, reports, and discretionary sanctions designed to help end discrimination against U.S. banks and bank holding companies that operate or seek to operate abroad.

A. Purposes

Subsection (a) of new section 15 states the purpose of section 15: to encourage foreign countries to accord de facto national treatment to U.S. banks and bank holding companies that operate or seek to operate in those countries; and thus to help end discrimination against U.S. banks and bank holding companies. "Discrimination" in subsection (a)(2) refers to any failure to accord "national treatment," as defined in subsection (f).

B. Annual Reports Required

Subsection (b) requires the Secretary of the Treasury to report to Congress each year (1) identifying each foreign country that, according to the most recent national treatment study, does not accord de facto national treatment to U.S. banks and bank holding companies, and yet with respect to which no determination under subsection (d)(1) is in effect; (2) explaining why the Secretary has not made (or has rescinded) such a determination; and (3) describing the results of any negotiations conducted pursuant to subsection (c). Such a report is due by the May 1 following the year with which the report deals.

C. Negotiations Required

Subsection (c) generally requires the Secretary of the Treasury to intiate negotiations with any foreign country if: (1) according to the Treasury Department's most recent national treatment study, that country does not accord U.S. banks and bank holding companies de facto national treatment; and (2) the Secretary has not made (or has rescinded) a determination under subsection (d)(1) with respect to that country. The objective of the negotiations is to ensure that the foreign country accords de facto national treatment to U.S. banks and bank holding companies. However, the Secretary need not initiate such negotiations if the Secretary determines that they would be fruitless or would impair national economic interests, and gives written notice of that determination to the chairman and ranking minority member of the Senate and House Banking Committees.

D. Discretionary Sanctions

1. *General rule.*—Subsection (d)(1) authorizes certain sanctions against persons from countries that discriminate against U.S. banks and bank holding companies. The Secretary of the Treasury may open the way for such sanctions by publishing in the Federal Register a determination that a foreign country does not accord U.S. banks and bank holding companies de facto national treatment. The Federal banking agencies may then, in consultation

with the Secretary of the Treasury, deny applications and disapprove notices filed by persons of that country.

Subsection (d)(1) authorizes the Federal banking agencies to deny applications and disapprove notices notwithstanding any inconsistent statute, regulation, treaty, or international agreement. The only exception is for international agreements covered by subsection (h)(1). The phrase "notwithstanding any other provision of law," which appeared in some antecedents of this section such as section 909 of S. 1886 (100th Congress), was omitted from subsection (d)(1) as unnecessary. Thus, for example, applications may be denied and notices disapproved notwithstanding treaty provisions according persons of the foreign country in question "national treatment," "most-favored-nation treatment," or both.

Subsection (d)(1) applies to any application requiring the approval of a Federal banking agency, including an application to acquire shares of a bank or bank holding company; to effect a bank merger; to establish a branch, agency, or commercial lending company; to engage in a nonbanking activity; to establish an Edge Act or Agreement corporation; or to obtain Federal deposit insurance. Subsection (d)(1) likewise applies to any notice that is subject to disapproval by a Federal banking agency, such as a notice under the Change in Bank Control Act, and to any transaction covered by subsection (e).

Nothing in section 15 requires a Federal banking agency to consult with the Secretary of the Treasury about issues other than those relating to the exercise of the agency's discretion under that section.

2. *Annual review.*—Subsection (d)(2) requires the Secretary of the Treasury to review annually any determination in effect under subsection (d)(1) and decide whether that determination should be rescinded. The objective is to avoid having a determination remain in effect through inertia when the reasons for the determination no longer exist.

If a Federal banking agency denied an application under subsection (d)(1) and the Secretary of the Treasury subsequently rescinded the determination on which the denial was based, the rescission would not grant the application, but would clear the way for a a new application.

E. Preventing Existing Entities From Being Used To Evade This Section

1. *General rule.*—Subsection (e)(1) creates a review procedure designed to prevent an existing bank, branch, agency, commercial lending company, or other affiliated entity from being used to evade sanctions under subsection (d)(1). If such an entity is a person of a country that the Secretary of the Treasury (acting under that subsection) has determined does not accord de facto national treatment to U.S. banks and bank holding companies, that entity generally may not, without prior approval under subsection (e): (1) commence any line of business in which it was not engaged as of the date on which the Treasury Secretary's determination was published in the Federal Register; or (2) do business at any location at which it did not do business as of that date.

The term "line of business' is drawn from and intended to have the same meaning as in section 225.145(c) of title 12, Code of Federal Regualtions, Thus, for example, the following are discrete lines of business: accepting demand deposits; accepting nondemand deposits that the depositor may withdraw by check or similar means for payment to third parties (e..g, NOW accounts); accepting savings deposits; commercial lending; consumer mortgage lending; consumer credit-card lending; other consumer lending; trust activities; discount securities brokerage; full-service securities brokerage; investment advisory services; and foreign exchange transaction services.

The prior-approval requirement does not apply to acquiring interests in companies that do not operate in the United States, as subsection (e)(1) by its terms applies only to commencing new lines of business and doing business from new locations "in the United States."

Subsection (e) is procedural: it creates a review procedure for certain transactions without specifying how a Federal banking agency should exercise its discretion with respect to those transactions.

2. *Exception for transactions under section 2(h)(2).*—Subsection (e)(2) specifically excepts from the prior-approval requirement transactions under section 2(h)(2) of the Bank Holding Company Act. Section 2(h)(2) permits a foreign bank or bank holding company principally engaged in banking outside the United States to acquire shares of a foreign company (the "investor company") also principally engaged in business outside the United States, and permits the investor company to acquire shares of any company engaged in the same general line of business as the investor company or a related line of business. Section 2(h)(3) prevents section 2(h)(2) from being used to hold shares of a company that engages in—or holds more than 5 percent of any class of voting securities of a company engaged in—any banking, securities, insurance, or other financial activities in the United States. Thus, because section 2(h)(2) cannot be used to conduct financial services, it does not raise those concerns about national treatment in financial services to which the title is directed.

3. *Review procedure.*—Subsection (e)(3) prescribes the review procedure applicable if three criteria are satisfied: (1) the entity in question is an uninsured State bank, an uninsured State branch, a State agency, or a commercial lending company; (2) the State requires that entity to obtain the prior approval of the State bank supervisor before commencing the new line of business or doing business from the new location in question; and (3) no provision of Federal law other than subsection (e) requires the entity to obtain the prior approval of a Federal banking agency before commencing that activity or doing business from that location. In all other cases subsection (e)(4) requires the entity in question to obtain the prior approval of the appropriate Federal banking agency. The effect of subsection (e)(3) is thus to coordinate the Federal review process with State prior-approval procedures in cases where there is currently no Federal prior-approval requirement.

4. *Effect on other law.*—Subsection (e) does not preempt (or otherwise relieve the entity in question from) any otherwise-applicable requirement of Federal law. Nor does subsection (e) in any way

limit a Federal banking agency's express or implicit authority to prevent evasions under other provisions of law.

F. National Treatment Defined

Subsection (f) defines "national treatment" as follows: a foreign country accords national treatment to U.S. banks and bank holding companies if it offers them the same competitive opportunities in that country (including effective market access) as are available there to that country's domestic banks and bank holding companies.

The definition is largely drawn from section 3502(b)(1) of the Omnibus Trade and Competitiveness Act of 1988, as well as section 601 of S. 1409 (reported by this Committee on June 23, 1987), sections 1501 and 1503 of the Senate amendment to H.R. 3 (adopted on July 21, 1987), and sections 909 and 910 of S. 1886 (passed by the Senate on March 30, 1988), all of the 100th Congress. The European Community's Second Banking Directive (adopted December 15, 1988) incorporated similar language.

The reference to "effective market access" is intended to emphasize that national treatment must be *de facto* as well as de jure; mere equality in the letter of the law will not suffice. That is what section 3502(b) and the Senate antecedents cited above meant by "the same competitive opportunities."

This Committee originated that phrase to encapsulate the guiding principle of the International Banking Act of 1978: national treatment to ensure equality of competitive opportunity. The Committee used "national treatment" to encompass that concept, in keeping with the opening paragraph of the Treasury Department's original national treatment study, which stated that the International Banking Act's guiding principle was "to provide 'national treatment' for foreign banks, *i.e.*, to accord foreign banks *equality of competitive opportunity* with their domestic counterparts in the U.S." *Report to Congress on Foreign Government Treatment of U.S. Commercial Banking Organizations* vii (1979) (italics in original). Indeed, "the same competitive opportunities" is itself a paraphrase of "equality of competitive opportunity." Thus the Committee, quoting from the Treasury's original study, described "national treatment" as follows:

> [N]ational treatment "afford(s) foreign banks equality of competitive opportunity vis-a-vis domestic institutions in similar circumstances." It "entails a pragmatic impact- or effects-oriented test for assessing the overall legal and regulatory climate affecting foreign banks in a given country. The test is met if foreign banks are allowed to compete on essentially equal terms with domestic institutions in the host country, even if some specific regulations or requirements applied to foreign banks differ from those affecting domestic banks."

S. Rep. No. 85, 100th Cong., 1st Sess. 42 (1987).

The conference committee on the Omnibus Trade and Competitiveness Act of 1988 took the same approach in discussing section 3502(b): "In the Conferees' view, a country accords national treatment to U.S. companies only if it accords them the same competitive opportunities as it accords to its domestic companies. National treatment requires a pragmatic, effect-oriented test for assuring that the same competitive opportunities exist." H. Rep. No. 576, 100th Cong., 2d Sess. 855 (1988).

The definition applies both to a U.S. banking organization's initial entry into a foreign country (sometimes referred to as its "establishment" there) and to its subsequent treatment in that country.

G. Person of a Foreign Country Defined

Subsection (g) broadly defines a person of a foreign country as any person that (1) is organized under the laws of that country; (2) has its principal place of business in that country; (3) if an individual, is a citizen of or is domiciled in that country; or (4) is directly or indirectly controlled by any of the foregoing.

H. Exercise of Discretion

1. *International agreements.*—Subsection (h)(1) requires the Secretary of the Treasury and the Federal banking agencies, in exercising their discretion under section 15, to act in a manner consistent with the obligations of the United States under a bilateral or multilateral agreement governing financial services entered into by the President and approved and implemented by Congress. Thus, for example, subsection (h)(1) covers the U.S.-Canada Free Trade Agreement and would cover any multilateral agreement governing financial services developed in the Uruguay Round of GATT negotiations, entered into by the President, and approved and implemented by Congress. Conversely, subsection (h)(1) would not apply to treaties of friendship, commerce, and navigation, even treaties that have some provisions dealing with financial services.

2. *Factors to consider.*—Subsection (h)(2)(A) requires the Federal banking agencies, in exercising their discretion with respect to an entity that is a person of a foreign country and is already operating in the United States, to consider: (1) the extent to which that foreign country has a record of according national treatment to U.S. banks and bank holding companies; and (2) whether that country would permit U.S. banks and bank holding companies already operating in that country to expand their activities there even if that country determined that the United States did not accord national treatment to that country's banks and bank holding companies. Other appropriate factors may also be considered.

Under subsection (h)(2)(B), the Federal banking agencies have discretion to further differentiate between entities already operating in the United States and proposed new entrants, insofar as such differentiation is consistent with achieving the purposes of section 15, as set forth in subsection (a).

Section 403. Effectuating the Principle of National Treatment for Securities Brokers and Dealers

This section adds a new paragraph (11) to section 15(b) of the Securities Exchange Act of 1934, creating a framework for securities brokers and dealers parallel to that for banks and bank holding companies under section 402 of the bill.

A. Purposes

Subparagraph (A) of new paragraph (11) states the purpose of the paragraph: to encourage foreign countries to accord *de facto* national treatment to U.S. brokers and dealers that operate or seek to operate in those countries; and thus to help end discrimination against U.S. brokers and dealers.

B. Annual Reports Required

Subparagraph (B) requires the Secretary of the Treasury to report to Congress each year (1) identifying each foreign country that, according to the most recent national treatment study, does not accord *de facto* national treatment to U.S. brokers and dealers, and yet with respect to which no determination under subparagraph (D) is in effect; (2) explaining why the Secretary has not made (or has rescinded) such a determination; and (3) describing the results of any negotiations conducted pursuant to subparagraph (C). Such a report is due by the May 1 following the year with which the report deals.

C. Negotiations Required

Subparagraph (C) generally requires the Secretary of the Treasury to initiate negotiations with any foreign country if: (1) according to the Treasury Department's most recent national treatment study, that country does not accord U.S. brokers and dealers *de facto* national treatment and (2) the Secretary has not made (or has rescinded) a determination under subparagraph (D) with respect to that country. The objective of the negotiations is to ensure that the foreign country accords *de facto* national treatment to U.S. brokers and dealers. However, the Secretary need not initiate such negotiations if the Secretary determines that they would be fruitless or would impair national economic interests, and gives written notice of that determination to the chairman and ranking minority member of the Senate Banking Committee and the House Energy and Commerce Committee.

D. Discretionary Sanctions

1. *General rule.*—Subparagraph (D) authorizes certain sanctions against persons from countries that discriminate against U.S. brokers and dealers. The Secretary of the Treasury may open the way for such sanctions by publishing in the Federal Register a determination that a foreign country does not accord U.S. brokers and dealers *de facto* national treatment. The Securities and Exchange Commission may then, in consultation with the Secretary of the Treasury, deny applications for registration as a broker or dealer filed by a person of that country, and prohibit any person of that country of that country, and prohibit any person of that country from acquiring control of a registered broker or dealer.

If the Secretary has published a determination under subparagraph (D) with respect to a given country, no person of that country may acquire control of any registered broker or dealer without giving the SEC at least 45 days notice of the proposed acquisition.

Subparagraph (D) authorizes the SEC to deny applications and disapprove notices notwithstanding any inconsistent statute, regulation, treaty, or international agreement. (The only exception is for international agreements covered by subpragraph (G)(i).) The phrase "notwithstanding any other provision of law," which appeared in some antecedents of this section, was omitted from subparagraph (D) as unnecessary. Thus, for example, applications may be denied and notices disapproved notwithstanding treaty provisions according pesons of the foreign country in question "national treatment," "most-favored-nation treatment," or both.

Nothing in paragraph (11) requires the SEC to consult with the Secretary of the Treasury about issues other than those relating to the exercise of the SEC's discretion under that paragraph.

2. *Annual review.*—Subparagraph (D)(iv) requires the Secretary of the Treasury to review annually any determination in effect under subparagraph (D) and decide whether that determination should be rescinded. The objective is to avoid having a determination remain in effect through inertia when the reasons for the determination no longer exist.

E. National Treatment Defined

Subparagraph (E) defines "national treatment" as follows: a foreign country accords national treatment to U.S. brokers and dealers if it offers them the same competitive opportunities in that country (including effective market access) as are available there to that country's domestic brokers and dealers. This standard is discussed above in connection with section 402 of the bill.

F. Person of a Foreign Country Defined

Subparagraph (F) broadly defines a person of a foreign country as any person that (1) is organized under the laws of that country; (2) has its principal place of business in that country; (3) if any individual, is domiciled in or a citizen of that country or (4) is directly or indirectly controlled by any of the foregoing.

G. Exercise of Discretion

1. *International agreements.*—Subparagraph (G)(i) requires the Secretary of the Treasury and the SEC, in exercising their discretion under paragraph (11), to act in a manner consistent with the obligations of the United States under a bilateral or multilateral agreement governing financial services entered into by the President and approved and implemented by Congress. Thus, for example, subparagraph (G)(i) covers the U.S.-Canada Free Trade Agreement and would cover any multilateral agreement governing financial services developed in the Uruguay Round of GATT negotiations, entered into by the President, and approved and implemented by Congress. Conversely, subparagraph (G)(i) would not apply to treaties of friendship, commerce, and navigation, even treaties that have some provisions dealing with financial services.

2. *Factors to consider.*—Subparagraph (G)(ii)(I) requires the SEC in exercising its discretion with respect to an entity that is a person of a foreign country and is already operating in the United States, to consider: (1) the extent to which that foreign country has a record of according national treatment to U.S. investment advisers; and (2) whether that country would permit U.S. investment advisers already operating in that country to expand their activities

there even if that country determined that the United States did not accord national-treatment to that country's investment advisers. Other appropriate factors may also be considered.

Under subparagraph (G)(ii)(II), the SEC may further differentiate between entities already operating in the United States and proposed new entrants, insofar as such differentiation is consistent with achieving the purposes of paragraph (11), as set forth in subparagraph (A).

Section 404. Effectuating the Principle of National Treatment for Investment Advisers.

This section adds a new subsection (i) to section 203 of the Investment Advisers Act of 1940, creating a framework for investment advisers paralled to that for banks and bank holding companies under section 402 and securities brokers and dealers under section 403 of the bill.

A. Purposes

Paragraph (1) of new subsection (i) states the purpose of the subsection: to encourage foreign countries to accord *de facto* national treatment to U.S. investment advisers that operate or seek to operate in those countries; and thus to help end discrimination against U.S. investment advisers.

B. Annual Reports Required

Paragraph (2) requires the Secretary of the Treasury to report to Congress each year (1) identifying each foreign country that, according to the most recent national treatment study, does not accord *de facto* national treatment to U.S. investment advisers, and yet with respect to which no determination under paragraph (4) is in effect; (2) explaining why the Secretary has not have (or has rescinded) such a determination; and (3) describing the results of any negotiations conducted pursuant to paragraph (3). Such a report is due by the May 1 following the year with which the report deals.

C. Negotiations Required

Paragraph (3) generally requires the Secretary of the Treasury to initiate negotiations with any foreign country if: (1) according to the Treasury Department's most recent national treatment study, that country does not accord U.S. investment advisers de facto national treatment; and (2) the Secretary has not made (or has rescinded) a determination under paragraph (4) with respect to that country. The objective of the negotiations is to ensure that the foreign country accords *de facto* national treatment to U.S. investment advisers. However, the Secretary need not initiate such negotiations if the Secretary determines that they would be fruitless or would impair national economic interests, and gives written notice of that determination to the chairman and ranking minority member of the Senate Banking Committee and the House Energy and Commerce Committee.

D. Discretionary Sanctions

1. *General rule.*—Paragraph (4) authorizes certain sanctions against persons from countries that discriminate against U.S. in-

vestment advisers. The Secretary of the Treasury may open the way for such sanctions by publishing in the Federal Register a determination that a foreign country does not accord U.S. investment advisers de facto national treatment. The Securities and Exchange Commission may then, in consultation with the Secretary of the Treasury, deny applications and disapprove notices filed by persons of that country. Paragraph (4) applies to any application requiring the approval of the Commission, and any notice that is subject to disapproval by the Commission.

Paragraph (4) authorizes the SEC to deny applications and disapprove notices notwithstanding any inconsistent statute, regulation, treaty, or international agreement. The only exception is for international agreements covered by paragraph (7)(A). The phrase "notwithstanding any other provision of law," which appeared in some antecedents of this title, was omitted from paragraph (4) as unnecessary. Thus, for example, applications may be denied and notices disapproved notwithstanding treaty provisions according persons of the foreign country in question "national treatment," "most-favored-nation treatment," or both.

Nothing in subsection (i) requires the SEC to consult with the Secretary of the Treasury about issues other than those relating to the exercise of the SEC's discretion under that subsection.

2. *Annual review.*—Paragraph (4)(E) requires the Secretary of the Treasury to review annually any determination in effect under paragraph (4) and decide whether that determination should be rescinded. The objective is to avoid having a determination remain in effect through inertia when the reasons for the determination no longer exist.

E. National Treatment Defined

Paragraph (5) defines "national treatment" as follows: a foreign country accords national treatment to U.S investment advisers if it offers them the same competitive opportunities in that country (including effective market access) as are available there to that country's domestic investment advisers. This standard is discussed above in connection with section 402 of the bill.

F. Person of a Foreign Country Defined

Paragraph (6) broadly defines a person of a foreign country as any person that (1) is organized under the laws of that country; (2) has its principal place of business in that country; (3) if an individual, is a citizen of or is domiciled in that country; or (4) is directly or indirectly controlled by any of the foregoing.

G. Exercise of Discretion

1. *International agreements.*—Paragraph (7)(A) requires the Secretary of the Treasury and the SEC, in exercising their disecretion under subsection (i), to act in a manner consistent with the obligations of the United States under a bilateral or multilateral agreement governing financial services entered into by the President and approved and implemented by Congress. Thus, for example, paragraph (7)(A) covers the U.S.-Canada Free Trade Agreement and would cover any multilateral agreement governing financial services developed in the Uruguay Round of GATT negotiations,

entered into by the President, and approved and implemented by Congress. Conversely, paragraph (7)(A) would not apply to treaties of friendship, commerce, and navigation, even treaties that have some provisions dealing with financial services.

2. *Factors to consider.*—Paragraph (7)(B)(i) requires the SEC, in exercising its discretion with respect to an entity that is a person of a foreign country and is already operating in the United States, to consider: (1) the extent to which that foreign country has a record of according national treatment to U.S. investment advisers; and (2) whether that country would permit U.S. investment advisers already operating in that country to expand their activities there even if that country determined that the United States did not accord national treatment to that country's investment advisers. Other appropriate factors may also be considered.

Under paragraph (7)(B)(ii), the SEC may further differentiate between entities already operating in the United States and proposed new entrants, insofar as such differentiation is consistent with achieving the purposes of subsection (i), as set forth in paragraph (1).

Section 405. Conforming Amendments Specifying That National Treatment Includes Effective Market Access

This section makes conforming amendments to three sections of current law.

A. Quadrennial Reports on Foreign Treatment of United States Financial Insitutions.

Section 3602 of the Omnibus Trade and Competitiveness Act of 1988 requires the Secretary of the Treasury to report at least every four years on, inter alia, the extent to which foreign countries deny national treatment to U.S. banking and securities organizations. Subsection (a) adds a definition of national treatment consistent with that adopted in sections 402 through 404 of the bill: "a foreign country denies national treatment to United States entities unless it offers them the same competitive opportunities (including effective market access) as are available to its domestic entities."

B. Negotiations to Provide Fair Trade in Financial Services

Section 3603(a)(1) of the Omnibus Trade and Competitiveness Act of 1988 directs the President or his designee to conduct discussions with foreign governments aimed at "ensuring that United States banking organizations and securities companies have access to foreign markets and receive national treatment in those markets." For consistency with sections 402 through 404 of the bill, subsection (b) specifies that access must be "effective."

C. Primary Dealers in Government Debt Instruments

Section 3502(b)(1) of the Omnibus Trade and Competitiveness Act of 1988 generally prohibits the Federal Reserve System from designating as a primary dealer in U.S. Government securities (or continuing any existing designation of) any person of a foreign country that "does not accord to United States companies the same competitive opportunities in the underwriting and distribution of government debt securities issued by such country as such country accords to domestic companies of such country." For consistency with sections 402 through 404 of the bill, subsection (c) specifies that "the same competitive opportunities" include "effective market access." In addition, subsection (c) makes two technical changes in phrasing: "accords to" becomes "offers"; and "as such country accords" becomes "as are available."

Subsection (c) affects only the definition of national treatment; it does not alter existing law—including the exemptions from and exceptions to section 3502(b)(1)—in any other respect.

TITLE V—EFFECTIVE DATES

Section 501. Effective Dates

This section establishes the effective dates for the various provisions of the "Defense Production Act Amendments of 1990."

REGULATORY IMPACT STATEMENT

Pursuant to Rule XXVI, paragraph 11(b) of the Standing Rules of the Senate, the Committee has evaluated the regulatory impact of the bill. It also considered the bill's impact on the privacy of individuals or firms doing business with the Federal government.

The Committee has considered the additional regulatory burden which the bill's amendments to the Defense Production Act impose on the firms, especially small business concerns, participating in the activities authorized under the Act, as amended. The Committee has also made the same assessment pertaining to the "Fair" Trade in Financial Services Act of 1990," contained in Title IV of the bill, as reported.

The amendments made to Title I of the DPA will impose no additional regulatory burdens on the private sector. The amendments made by Section 112 will restrict the government's ability to compel contractors to furnish products or services relating to the covered subject matter.

The amendments made to Title III and Title VII of the DPA have been crafted to impose the most minimal additional paperwork burdens, while maximizing the benefits the defense industrial and technology base derive from these enhancements of the Act's authorities. Particular attention regarding minimizing paperwork burdens and protecting business confidential information was applied during the formulation of Sections 125 and 126. As previously discussed in detail in part III of this report, the offset reporting requirement imposed by Section 125 of the bill is expected to apply to less than 250 firms and to entail a minimum reporting requirement. Both Sections 125 and 136 of the bill relating to the collection of data regarding firms participating in the defense industrial and technology base as prime contractors, subcontractors, and suppliers prescribe the information objectives to be attained and do not prescribe specific data collection requirements. This provides maximum implementational flexibility to minimize papework burdens. The paperwork burdens associated with implementation of these explicit data collection provisions, and all other provisions of the bill which may generate a paperwork burden, will be subject to review by the Office of Information and Regulatory Affairs and will have to meet the standards of the Paperwork Reduction Act of 1980, as amended (44 U.S.C. 3501, et seq.).

The amendments made by Title IV of the bill will result in no net increase in the regulatory burden imposed by the Government. The Treasury Department and banking regulators are given discretionary authority to deny applications from foreign financial institutions from a country that does not grant U.S. financial institutions *de facto* national treatment. No action is required by the bill.

CHANGES IN EXISTING LAW

The Committee has determined that it is necessary, in order to expedite the business of the Seante, to dispense with the requirements of Rule XXVI, paragraph 12 of the Standing Rule of the Senate with respect to the legislation.

COST OF LEGISLATION

The Committee has requested a cost estimate of this legislation under the provisions of Section 403 of the Congressional Budget Act of 1974. The cost estimate of the Congressional Budget Office appears below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 10, 1990.

Hon. DONALD W. RIEGLE, Jr.,
Chairman, Committee on Banking, Housing, and Urban Affairs
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate on S. 1379, the Defense Production Act Amendments of 1990, as ordered reported by the Senate Committee on Banking, Housing, and Urban Affairs on May 24, 1990. This estimate supersedes one transmitted on June 27, 1990, clarifying the description and slightly modifying the estimated costs of Title IV.

Should the Committee so desire, we would be pleased to provide further details on the attached cost estimate.

Sincerely,

ROBERT F. HALE
(For Robert D. Reischauer, Director).

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 1379.
2. Bill title: Defense Production Act Amendments of 1990.
3. Bill status: As ordered reported by the Senate Committee on Banking, Housing, and Urban Affairs on May 24, 1990.
4. Bill purpose: To reauthorize and amend the Defense Production Act of 1950, and for other purposes.
5. Estimated cost to the Federal Government:

[By fiscal years, in millions of dollars]

	1990	1991	1992	1993	1994	1995
Defense Production Act Amendments:						
Estimated authorization level	250	253	252	252	0	0
Estimated outlays	0	27	85	120	143	126
Fair trade in financial services:						
Estimated authorization level	(1)	(1)	(1)	(1)	(1)	(1)
Estimated outlays	(1)	(1)	(1)	(1)	(1)	(1)
Bill total:						
Estimated authorization level	250	253	252	252	0	0
Estimated outlays	0	28	85	120	143	126
Committee amendment:						
Estimated authorization level	−250	−167	−167	−167	0	0
Estimated outlays	0	−25	−54	−67	−93	−65
Revised bill total:						
Estimated authorization level	0	86	86	86	0	0
Estimated outlays	0	3	31	53	50	61

[1] Less than $500,000.

Over 95 percent of the costs fall within Function 050.

Totals may not add due to rounding.

Basis for Estimate

This bill alters two distinct areas of current law. Firstly, Tiltes I through III of the bill would amend the Defense Production Act of 1950 (DPA) to extend the authorities of the DPA beyond its current expiration date—August 10, 1990; to expand the authorities and annual authorizations under DPA; and, to assess and improve the ability of domestic firms to provide adequate industrial capabilities for the national defense. Secondly, the bill addresses issues of fair trade in the financial services industry. This final section of the bill (Title IV) was also ordered reported by the Committee on Banking, Housing, and Urban Affairs as a freestanding bill (S. 2028).

Defense Production Act Amendments

The Defense Production Act of 1950 (DPA) authorizes a system for placing priorities on defense contracts (DPA Title I) and increasing domestic capabilities to produce goods necessary to the national defense (DPA Title III). Presently, the Department of Defense (DoD), the Department of Energy (DoE), the Federal Emergency Management Agency (FEMA), and the Department of Commerce (DoC) use authorities provided by the DPA. S. 1379 would extend the DPA authorities to September 30, 1993. The cost of this reauthorization would be approximately $600 thousand per year. This figure is based on estimates from the DoC, FEMA, and the DoD of the average salaries for the number of full-time equivalent employees that presently oversee the administration of Title I and conduct Title III activities. These employees are included in the annual appropriations for FEMA and the Departments of Defense and Commerce. Though S. 1379 would provide the authority for activities from August 11 through the end of fiscal year 1990, it was assumed that no additional appropriations for fiscal year 1990 would be provided. Estimated authorizations for fiscal years 1991 through 1993 are calculated using increases for the federal pay raises that are projected by the CBO, and outlays are based on historical rates for federal personnel.

Title III of the DPA allows the Defense Department to use any combination of direct loans, loan guarantees, or purchase guarantees to correct a shortfall in domestic capacity to produce goods that are necessary to the national defense. S. 1379 would establish a revolving fund (the DPA Fund) through which these activities would be conducted. The DPA Fund would be financed with a $200 million transfer of unobligated balances of the National Defense Stockpile Transaction Fund, sales of goods purchased through the Title III mechanism, and appropriations made to the DPA Fund. Obligation of any of these funds is subject to appropriations action.

The bill states authorizations for appropriation to the DPA Fund of $250 million for each of fiscal years 1990, 1991, 1992, and 1993. The committee staff has indicated that the Committee will submit an amendment that would change these authorizations to a total of $250 million for fiscal years 1991 through 1993. The table shows both the authorizations as stated in the bill and the effect of the amendment. The estimate assumes that the transfer from the Stockpile Transaction Fund will be made available for use in the DPA Fund, that after amendment the annual authorizations will be appropriated to the DPA Fund in three equal installments, and that the funds will be available for obligation by October 1, 1990.

Presently, the DoD uses the DPA to make purchase guarantees, that is, DoD signs a contract stating that it will buy a specific quantity of a defense good if a manufacturer agrees to acquire the capacity to produce this good and cannot sell it elsewhere. This estimate assumes that the DoD would continue this practice, and that the obligation rate and outlays from the Fund would follow recent historical patterns for the existing account.

Under current law the dollar limit that can be committed per industrial resource shortfal is $25 million. S. 1379 would increase this amount to $50 million. DoD is planning DPA projects that exceed the higher limit, for which they could ask for a waiver. Though raising these limits may shift the use of DPA authorities, this would not affect the total cost of the DPA to the federal government.

This bill also would require the President to perform several studies and issue reports to the Congress. Most of these studies would not result in significant added costs to the federal government since they are similar to activities already conducted by the relevant agencies. Specifically, this would apply to the reports required in Sections 115, 116, 128, and 201.

Two studies (required by Section 126 and 221), however, could result in a significant cost to the government. Section 126 of the bill would authorize "such sums as may be necessary" to produce a systematic, regular method for assessing the capability of the industrial base as part of the national defense strategy, especially in regard to foreign dependence in technologies that may be critical to the national defense. The Bureau of the Census, in consultation with FEMA and the DoD, is to provide for the collection of this data. The cost of such a project would depend on the scope, frequency of sample, and level of detail required—the bill language in these areas is open to interpretation. Analysts at the Census

Bureau estimate that the total costs of such a project would be at least $1.2 million and could be as high as $2.5 million. FEMA estimates that their additional costs would be over $900 thousand annually. Similarly, Section 221 would require the General Accounting Office (GAO) to determine the extent of the individual states' use of incentive programs to attract foreign investment. Based on the estimates from the Census Bureau, FEMA and the GAO, CBO estimates that costs for these two studies would total about $3 million.

Section 127 of the bill would allow certain industry consortia to be exempt from antitrust regulations. A proposed consortium must apply through the Attorney General to earn this exemption. The Justice Department must then examine the proposal and certify or reject the consortium. There would be increased costs to the Justice Department from enactment of this provision, and such costs could be as much as several million dollars depending on the number and complexity of applications submitted.

The extent of additional costs from enactment of Section 211 of the bill is also uncertain. This provision would allow the Secretary of Defense to reward contractors who modernize production facilities with as much as a ten percent increase in reimbursable costs. Since the Secretary is not required to employ these incentives, it is not clear whether this authority would be used at all. Also, it is not clear whether this increase would apply just to the reimbursable costs of the contractor or to the profit that the contractor is allowed to earn on these investments. The DoD already has a program whereby it reimburses contractors for special tooling and test equipment that is unique to the production of defnese goods. Under this program DoD must pay at least half of the tooling costs at the start of the contract and the rest is amortized over the life of the contract. If the ten percent increase is in these reimbursable costs, the total amount reimbursed by the government would not change—though the timing of the payments could be affected. If the increase is in the contractor's profit, sources at the DoD estimate that this could increase the costs of DoD procurement contracts by as much as $200 million. The CBO has no independent estimate of this provision.

Fair Trade in Financial Services

Under current law, every four years the Secretary of the Treasury prepares a study that examines whether foreign countries provide U.S. banks and bank holding companies, securities brokers and dealers, and investment advisers the same competitive opportunities that are available to their own domestic firms. This bill would authorize the Secretary to publish in the Federal Register a determination that a country does not provide such competitive opportunities. If the Secretary publishes such a determination for any country, the bill would authorize federal banking regulators and the Securities and Exchange Commission (SEC) to prohibit persons of that country from conducting certain financial service activities in the United States. With certain exceptions, the bill would require the Secretary to initiate negotiations with foreign countries identified in the quadrennial report as not providing competitive opportunities and for which the Secretary has not published a determination. Furthermore, the Secretary would be required to prepare an annual report identifying these countries, explaining why a determination has not been made or has been rescinded, and describing the results of negotiations.

Based on information from the Department of the Treasury, CBO estimates that the negotiations and annual reports required by the bill would cost $200,000 to $300,000 each year beginning in 1991, assuming appropriation of the necessary amounts. This sum would cover the costs of the additional staff and associated overhead expenses necessary to prepare the reports and conduct the negotiations. Provisions of the bill affecting the SEC and the banking regulatory agencies are not expected to result in significant additional costs.

6. Estimated cost to State and local governments: Under Title IV, state officials would be required to consult with federal banking regulators in reviewing applications by state-chartered branches and agencies of foreign banks whose home countries are found by the Secretary to not provide competitive opportunities for U.S. firms. States also would be required to forward to the federal agencies the record of each approved application. Based on information from the Conference of State Bank Supervisors, CBO estimates that implementation of these requirements would result in no significant costs to state or local governments.

7. Estimate comparison: None.

8. Previous CBO cost estimate: On June 27, 1990, CBO prepared a cost estimate for S. 1739, as ordered reported by the Senate Committee on Banking, Housing, and Urban Affairs. This estimate supersedes the earlier one. It clarifies the description of Title IV and slightly modifies the estimated costs of that title.

Title IV of this bill was also ordered reported as a freestanding bill—S. 2028. The estimates for S. 1379 and S. 2028 were prepared and sent to the Committee on Banking, Housing, and Urban Affairs simultaneously.

9. Estimate prepared by: Barbara Hollinshead, Laura Carter, James Hearn, Mitchell Rosenfeld, Michael Sieverts, and Joseph Whitehill.

10. Estimate approved by: C.G. Nuckols for James L. Blum, Assistant Director for Budget Analysis.

ADDITIONAL VIEWS OF SENATOR JOHN HEINZ

The original Defense Production Act was a product of the Korean War, but it takes a new relevance today in light of the critical technology crisis our country faces. I have addressed this problem on several occasions in the past on the Senate floor with respect to specific technologies such as high definition television, flexible manufacturing systems, and optical storage devices, but when examined in the aggregate, the situation is even worse.

This is best illustrated by the recent report of the Department of Commerce, "*Emerging Technologies: A Survey of Technical and Economic Opportunities,*" which was an in-depth study of 12 emerging technologies, their projected annual sales by the year 2000, and the status of the United States industry in each category vis-a-vis its main competitors, Japan and the European Community. The outlook for American industry from this perspective is far from bright.

The study includes two "report cards," one detailing the current standing of U.S. industry in these 12 sectors, the other discussing future trends for U.S. competitiveness.

With respect to the former, the United States is behind Japan in 5 sectors and ahead in 6. Compared to the EC, we are behind in one and ahead in 9. That, of course, is a static analysis looking at the current status quo. The second report card, which reflects trends, is much more significant for the future and makes clear the fundamental weaknesses in our economy.

With respect to those items that will be critical components of a 21st century economy, the United States is either losing or losing badly to Japan in 9 of 12 sectors. We are holding our own in only 3. Against the EC, the United States is either losing or losing badly in 3 sectors and is barely holding its own in 6. Equally significant, we are not gaining on Japan in any of the 12 emerging sectors and are improving our position against the EC in only 3.

While this sorry state of affairs is relevant to our entire economic infrastructure, it is also of special importance to the defense sector because it impacts directly on our ability to maintain our status as the world's military leader. Modern weapons systems and the command and control functions that make them viable have advanced along with the civilian economy. Dependency on foreign sources for chips, for example, has military as well as commercial implications, as Shintaro Ishihara pointed out in his portion of the book, "*The Japan that Can Say No.*"

The Defense Production Act as amended and extended by this Committee is a critical element in combating this problem, particularly through the creation of additional authority in this bill which focuses on preservation of subcontractors and component suppliers. Historically, most of our attention, including that of the media, has focused on prime contractors—the people who assemble the final, identifiable product.

While it may be amusing to argue that a fighter airplane is nothing more than 25,000 parts flying in close formation, from a procurement point of view there is considerable truth to the statement, and it is certainly relevant to point out the criticality of some of those parts *vis a vis* others. Losing our capacity to produce some of those within the United States or Canada inevitably renders us vulnerable to both potentially changing foreign policies abroad and disruptions of supply that are likely to occur during periods of conflict.

For 40 years the Defense Production Act has helped prevent this eventuality from occurring through its authority to nurture industries and production that are critical to our defense capability. The bill reported by this committee will continue and expand that role at a time when we desperately need to give more attention to the problem, and it will do it in a way that takes into account the complexity and sophistication of modern technology. For that reason I support the bill, and I urge Senators to review it now in light of the technological changes that have taken place in the world over the past 40 years and the need to maintain our leading role in the face of those changes. Reliance on old methods and the blind assumption that our technology is both infinitely available and inevitably superior can only insure our gradual decline to second class status.

JOHN HEINZ.

ADDITIONAL VIEWS OF SENATOR PHIL GRAMM

There is something about freedom that abhors monopoly. Monopoly, whether sponsored by Government or merely nurtured by government, destroys personal opportunity in general and free enterprise in particular. No doubt, monopoly carries with it certain efficiencies, which may be important in time of war. But those efficiencies come at a terrible cost in terms of stifled creativity, higher prices, and declining productivity, which are irreplaceable components of economic growth.

The application of the Defense Production Act in anything short of emergency conditions ignores this important economic lesson and does so at our peril. Rather than promoting our national defense through economic diversity and reduced dependence on single products or industries, the DPA fosters monopoly and limited economic opportunity. A specter from the economic dark ages, it legalizes government intrusion into individual private economic activities through the imposition of economic restrictions, the forced violation of contracts, regimentation of production, control of prices, and the subsidization of enterprises unable to compete. Should market conditions render an industry obsolete or inviable, other provisions of the DPA would allow the government to spend taxpayers' funds on commitments to purchase unneeded commodities at prices above those prevailing in the marketplace. Of course, the subsidized, failing enterprise can be expected to contribute little to the taxes to pay for these subsidies. Instead, the more productive, the more profitable and thus the more heavily taxed, will pay for the less productive.

Unfortunately, the bill reported by the committee would reinforce the monopolistic supports in the DPA, adding to them the suspension of many of the antitrust protections of current law. As a result, the legislation would further the creation of peacetime monopolies which, ultimately, will reduce our ability to protect the national security.

The timing of this legislation could not be more ironic, coming just as the Soviet Bloc is struggling with the herculean task of liberating itself from stifling economic exploitation. In the monopoly-controlled Soviet economy, almost every industry is irreplaceable. If a Russian needs to buy a car, he must buy a Lada, if he can get one. An American may buy a Chevrolet, or a Ford, or a Toyota, or a Volkswagen, or several dozen other makes and models; he might even be able to find a Lada. No one make or model is essential. Studebaker went out of business, and yet the Republic rolled on. Freedom of economic opportunity also frees us from economic dependence. Perestroika was born from Soviet recognition of the perilous dependencies of the economy on state monopolies and the security imperative to promote diversity.

This bill, out of date even for Moscow, rests squarely on the anachronistic assumption that government can be trusted to identify accurately and fairly, and effectively foster, those industries determined vital to our national security. This assumes a level of knowledge, wisdom, and virtue thus far unprecedented in the governments of humans. Fortunately, it is a well-tested assumption. It has been the subject of an experiment involving almost half of the population of the world over the span of more than half a century. The great contribution of Marxism-Leninism to mankind has been to show the utter folly of entrusting government with the control of the economy. The East Germans, the Chinese, the North Koreans, have tried their very best to make the system work; no sacrifice was spared in the effort. Fortunately, wherever this disastrous experiment has been tried, there has been one along side it based upon economic opportunity. The results are revealed in a trail of refugees.

Having won the central battle of the Cold War, is it not time to lay aside our efforts to mimic the failed programs of our foes? These efforts unfailingly tend toward the conversion of the Act into a giant pork barrel, policies proposed that are less crucial to the defense of America than they are to the defense of congressional seats. Only one ludicrous example of proposals that have been heard is the suggestion by some for the stockpiling of computer chips. It would make just as much sense (to anyone but chip makers) to stockpile bread, since computer chips become obsolete about as quickly as bread becomes moldy. No doubt, had their been a DPA in 1910, efforts would have been made to use it to transfer resources from automobiles to horse farms.

In this age of growing economic freedom, the Congress should reject this well-intentioned throwback to a failed chapter of economic history.

PHIL GRAMM.

ADDITIONAL VIEWS OF SENATOR CHRISTOPHER S. BOND

For four decades, the Defense Production Act has served as a tool that the President could use to ensure the ability to mobilize the nation's industrial resources for defense purposes. Through limited and measured use of the authorities contained in the Act, defense planners have over the years ensured continued production of critical materials and suppliers.

In the past few years, there have been many who have pointed to the deterioration of the nation's defense industrial base and called for measures to address that deterioration. S. 1379 is one measure intended to address that perceived need. The legislation starts from the premise that the defense industrial base is in need of assistance and protection, and goes on to assert that that assistance must come from the government.

Though I would agree that there are times when it is appropriate for the govenment to be involved in assisting private businesses, I believe this bill goes too far and prescribes the wrong medicine for the ailment in the defense industrial base that the committee believes exists. The best thing the federal government can do for the companies that make up the defense industrial base is to reduce burdens on them, not increase them. This means eliminating paperwork and unnecessary reporting requirements; enacting trade laws which facilitate their free and fair competition in the world marketplace; and providing payment and reimbursement policies which encourage research and development and investment in new plant and equipment.

I believe the companies and workers that make up America's defense industrial base would be better served by less far-reaching and better directed legislation than S. 1379. Specifically, I would support legislation simply to extend and update the Defense Production Act. At the very least, we ought to address the following sections within S. 1379 which will only serve to hamper their ability to remain viable and productive parts to the defense industrial base.

Section 125. Annual Report to Impact of Offsets

Section 125 of the bill would amend section 309 of the Defense Production Act which now requires the President to submit to Congress an annual report on offsets. The bill removes the President's authority to delegate responsibility for preparing the report to whomever he deems appropriate, and instead requires that the President's report be prepared by the Secretary of Commerce. This is unnecessary intrusion into the President's right to organize his administration as he sees fit. Given the impact of offset arrangements on defense and foreign policy, as well as economic affairs, the President ought to retain the ability to assign responsibility for the preparation of the report to whichever official he deems most appropriate for the task. The issue for Congress should be the substance of the report itself, not picking winners and losers in the contest over who will prepare the report for the President.

Section 125 of the bill also would require defense companies to report to the federal government on any sale that includes an offset arrangement of $5 million or ore. Although the bill does not explicitly state to whom these notifications will be made, there is a strong implication that they will be made to the Secretary of Commerce since the Commerce Department is given sole authority for issuing the annual offset report and for promulgating the regulations which would specify the agency to receive the notifications. There are several problems with this section.

No defense company aggressively seeks to include offset arrangements in a sale of defense items. Companies use offsets only as a necessary element to achieving a sale. Although we would prefer to see them eliminated or limited, they are, at least for the present, a fact of international business life. We cannot stick our head in the sand and hope they will go away, and we cannot attempt to control them unilaterally. In 1988, as part of the Department of Defense Authorization Act, Congress gave the President the authority to enter into bilateral and multilateral negotiations to try to bring some restraint to requirement for offsets in foreign military sales. The President recently announced his policy approach on that subject and we should give his negotiation efforts a better chance to succeed. He already has made some progress as we have seen in the case of the Korean fighter program.

Second, while it may make sense to collect some information on offsets and their impact, Commerce is not the right agency to do so. The information that would be covered in the annual report deals with offsets associated with sales of defense items. These sales are conducted under the authority of the Arms Export Control Act. That statute and the sales themselves are overseen by the Defense and State Departments, not the Commerce Department. Thus, the Commerce Department is not the logical agency to prepare the report.

Third, the report required by this section would duplicate several existing governmental review and reporting provisions, one of which we enacted just two years ago. Under the provisions of 10 USC 2505(c), for example, defense companies are already required to notify the Secretary of Defense of all sales which include offset arrangements of $50 million or more. In addition, any offset deal, regardless of the dollar value, which involves the transfer of sensitive technology requires approval by either the State or Commerce Department. Furthermore, since offsets are associated with defense items, the State Department, in consultation with the Defense Department, must oversee and affirmatively approve these sales. Thus, it is clear that we are getting adequate oversight of the impact of offsets under existing statutes. The likely result of this bill is that contractors will have to report offset deals to two or even three different federal agencies at two different minimum dollar thresholds. If, in fact, our goal is to make the defense industrial base stronger by making U.S. defense companies more competitive, then we ought to be easing bureaucratic burdens and paperwork, not doubling them unnecessarily.

During the course of the Banking Committee's hearings, there were concerns expressed that the inclusion of offset arrangements in international defense sales is having a disproportionate impact on the smaller subcontractors and suppliers in the defense industrial base. To focus attention properly on those critical tiers in the defense infrastructure, the Committee included section 126 which requires a biannual assessment of the subsectors of the economy deemed critical to the development and production of national defense material. I support section 126 as an alternative to the unnecessarily-low reporting thresholds provided for in section 125.

In summary, section 125 is legislative overkill and is simply not needed to achieve its intended goals. The extent of overkill is illustrated simply by looking to non-defense foreign sales and offshore investment. An automobile company or a construction and engineering firm can transfer hundreds of millions of dollars of technology without any notification to the government so long as the technology is not controlled. Examples abound. The Japanese have built a part of every Boeing airliner model produced in the past 30 years and will have a major role in producing the new 777. McDonnel Douglas is building MD-80 airliners in China. Bechtel builds state-of-the-art petrochemical plants throughout the Middle East and the rest of the world. GM recently announced plans to open a new engine plant with Mazda in the United Kingdom. American companies are rushing to invest in new plants all over Eastern Europe. All of these deals are going forward—as they should—with no government involvement beyond the export control process. To assert that there is a need to review all offset agreements—which are in most cases no different than the commercial arrangements noted above—simply does not hold water.

Section 212. Procurement of Critical Components or Critical Technology Items

This section would require the President to develop an acquisition policy for the procurement of critical components which would specify minimum percentages of contracts that would go to domestic firms. The policy could allow the use of domestic subcontractors to take precedence over other factors such as quality or price.

This provision is almost certain to be seen by our trading partners as a protectionist measure. The likely results will be retaliatory measures against U.S. companies trying to sell their goods and services overseas. At a time of shrinking domestic defense budgets, U.S. companies will need overseas sales to ensure their continuted viability. They cannot afford to lose any of those sales due to misguided policies such as this one. Rather than achieving its intended goal of ensuring the continued health of U.S. suppliers of critical technology and components, this provision could well speed their demise by taking from them badly-needed overseas defense sales. Further, arbitrarily shutting out foreign companies to the U.S. markets is a violation of the spirit, if not the letter, of the GATT, several bilateral MOUs, and the policy initiatives of the President and this Congress. A final reason for not enacting this provision is that to the extent that there are critical industries or critical technologies that need to be protected, there is sufficient authority in both the Defense Production Act and the contracting procedures under the Competition in Contracting Act to protect them.

Section 221. GAO Study of State Foreign Incentive Programs

This section would require a GAO study of individual State programs to attract foreign investment. Though the version that was included in the bill is an improvement over the original language, I believe this is an area in which it is neither proper nor necessary for the Federal Government to intervene.

Most States operate aggressive programs to attract new business—both foreign and domestic. The competition for new investment is fierce because new investment means new jobs and increased economic activity, often in rural communities that have suffered in recent years. This competition is healthy and is part of the reason that the United States continues to attract new facilities.

The conern that the activity of the States to attract foreign investment is harmful to our economy is clearly misplaced. According to the National Association of State Development Agencies, "[N]ot one State offered special incentives to foreign companies that were not available to domestic firms." Given this universal lack of preference, I do not see what reason there would be for the Federal Government to conduct such a study.

As a former Governor, I can say unequivically that I would not have wanted Federal bureaucrats poking around in my State programs and trying to tell me how to run them; and I certainly would have opposed any Federal effort to curb my ability to improve my State's economy by bringing in new jobs and investment. I feel confident that the overwhelming majority of the Nation's Governors would share that sentiment.

CHRISTOPHER S. BOND.

APPENDIX A

MAJOR STUDIES

The steady erosion of the defense industrial and technology base has been the subject of numerous DOD, industry, GAO, and Congressional reviews since the mid-1970's. Some of the major analyses are:

November 1976.—Defense Science Board Task Force on Industrial Readiness Plans and Programs

1980.—Hearings (13 days; 1796 page record) by a specially created Defense Industrial Base Panel of the House Armed Services Committee

December 1980.—*The Ailing Industrial Base: Unready for Crisis,* the report of the Defense Industrial Base Panel, House Armed Services Committee

January 1981.—Report of the Defense Science Board, 1980 Summer Study on Industrial Responsiveness

February 1981.—*Defense Industrial Base Issues,* a series of industry briefings to the House Armed Services Committee

July 1981.—*Deterioration of the U.S. Defense Industrial Base,* hearing by the Senate Committee on Small Business

September 1981.—*Restoring America's Defense Industrial Base,* hearing by the Joint Economic Committee

April 1984.—*Assessinng Production Capabilities And Constraints in the Defense Industrial Base,* GAO report

May 1985.—*Overview of the Status of the Defense Industrial Base and DOD's Industrial Preparedness Planning,* GAO report

March 1988.—*The Defense Technology Base: Introduction and Overview,* a special report of the Office of Technology Assessment on Maintaining the Defense Technology Base

July 1988.—*Bolstering Defense Industrial Competitiveness,* a report by the Under Secretary of Defense (Acquisition)

August 1988.—*Industrial Base: Defense Critical Industries,* GAO report

September 1988.—*Lifeline in Danger,* an assessment of the U.S. Defense Industrial Base sponsored by the Air Force Association

October 1988.—Report of the 1988 Defense Science Board Study on the Defense Industrial and Technology Base

April 1989.—*Holding the Edge: Maintaining the Defense Technology Base,* Office of Technology Assessment

May 1989.—Deterrence in Decay: The Future of the U.S. Defense Industrial Base, a report by the Center for Strategic and International Studies

November 1989.—*Adequacy of Information on the U.S. Defense Industrial Base,* GAO report

APPENDIX B

U.S. Department of Justice,
Office of Legislative Affairs,
Washington, DC, April 30, 1990.

Hon. Donald W. Riegle,
Chairman, Committee on Banking, Housing, and Urban Affairs,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: This letter presents the views of the Department of Justice on S. 2028, the "Fair Trade in Financial Services Act of 1990." This bill would amend the International Banking Act, 12 U.S.C. §3101 *et seq.*, to encourage the opening of foreign markets to United States firms that provide financial services.

In its current form, the bill contains two provisions that present serious constitutional concerns. Specifically, S. 2028 would add a new section 15 to the International Banking Act. Section 15(c)(1) would require the Secretary of the Treasury to initiate negotiations with certain foreign countries to ensure that they offer United States banks the same competitive opportunities as those countries provide for their domestic banks. Section 15(c)(2) would create an exception to this requirement, whereby the Secretary need not initiate negotiations if he "determines that [they] would be fruitless or would impair national economic interests" and if he "give[s] written notice of that determination" to certain congressional committees.

Similarly, S. 2028 would add a new section 15(b)(11) to the Securities Exchange Act. Section 15(b)(11)(D)(i) would require the Secretary of the Treasury to initiate negotiations with certain foreign countries to ensure that they offer United States brokers and dealers the same competitive opportunities as enjoyed by the brokers and dealers of those nations. Section 15(b)(11)(D)(ii) would create an exception to the negotiation requirement analogous to that with respect to negotiations over banks.

The negotiation requirements in S. 2028 impermissibly infringe upon the authority of the Executive to conduct negotiations with foreign nations. The Supreme Court has clearly stated:

> In th[e] external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the filed of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As [then-Representative John] Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ

> of the nation in its external relations, and its sole representative with foreign nations."

United States v. *Curtiss-Wright Corp.*, 299 U.S. 304, 319 (1936) (emphasis in original; citation omitted). A requirement that an Executive officer conduct negotiations with foreign nations concerning banks or brokers and dealers plainly would contravene this principle.

Although S. 2028 does provide an exception to each of its negotiation requirements, those exceptions are insufficient to make the bill constitutional, as they would not fully restore Executive authority. First, the exception is applicable only if negotiations would be "fruitless or would impair national economic interests." The President's authority to determine whether to negotiate, however, is plenary and cannot be circumscribed by criteria that Congress establishes.

Second, the exception is inconsistent with the secrecy with which the President may conduct negotiations. In *Curtiss-Wright*, the Supreme Court emphasized:

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations. * * *

299 U.S. at 320–21. In light of these concerns, the Constitution provides that decisions concerning "the form of the President's action—*or, indeed, whether he shall act at all*" shall rest exclusively with the President. *Curtiss-Wright*, 299 U.S. at 321 (emphasis added). To avoid the negotiation requirements of the bill, the Secretary of the Treasury would be required to disclose whether he is negotiating with a foreign country, thus undermining the President's authority to keep secret the existence of negotiations.

These constitutional objections could be resolved by amending S. 2028 to make the negotiation provisions therein purely advisory.

However, amending the bill to address constitutional concerns would not alleviate the serious underlying problems previously identified by the Administration. On policy grounds, the Administration opposes S. 2028 because of its reciprocity language. We object to such language because of interational obligations of the United States, and because of the risk that reciprocity would be used, leading to likely retaliation.

The Office of Management and Budget has advised this Department that it has no objection to the submission of this report to the Congress from the standpoint of the Administration's program.

Sincerely,

BRUCE C. NAVARRO,
Acting Assistant Attorney General.

APPENDIX C

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
Washington, DC, May 11, 1990.

To: Senate Committee on Banking, Housing, and Urban Affairs, Attention: Mr. Raymond Natter.

From: American Law Division.

Subject: Analysis of Justice Department Constitutional Concerns Regarding the Fair Trade in Financial Services Act (S. 2028).

Your letter of May 1, 1990 to Mr. Joseph Ross, Director, Congressional Research Service, has been referred to us for an examination of the Justice Department's objections to the Fair Trade in Financial Services Act (S. 2028).

The legislation in question amends the International Banking Act of 1978, 12 U.S.C. 3101 *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. 78o(b), to encourage the opening of foreign markets to United States firms that provide financial services. In order to assure United States banks and holding companies and United States brokers and dealers the same competitive opportunities as are available to domestic counterparts, the Secretary of the Treasury would be required to initiate negotiations leading to the elimination of disparate treatment directed against Americans in this regard. However, there would be no obligation to initiate negotiations if the Secretary determines that "negotiations would be fruitless or would impair national economic interest" and "gives written notice of that determination" to the Senate and House Banking Committees.

The Justice Department's "constitutional concerns" are basically two fold: that the described negotiating requirements interfere with the President's monopoly to conduct foreign negotiations and compromises the need for secrecy that frequently attends and ensures success in reaching agreements with foreign nations. In support of its conclusions, Justice places exclusive reliance on *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), and, in particular, the now familiar passage at page 319 of the opinion where Justice Sutherland contrasts the President's power to *negotiate* treaties with his power to *make* treaties. The former he does "alone" while the latter requires the advice and consent of the Senate.

With respect to the element of secrecy, Justicie quotes another familiar passage from pages 319–320 of the opinion to the effect, previously indicated, that secrecy and success in negotiations "often" go hand in hand.

In our view the Justice Department's reliance on *Curtiss-Wright* is not so much misplaced as overly generous and, moreover, disregards a long record of laws which give negotiating authority to designated officials other than the President.

The *Curtiss-Wright* opinion's expansive view of presidential powers in the field of foreign affairs generally, and with respect to the conduct of negotiations in particular, are largely *dicta*. Entitled to respect and respected by the Senate since early on, especially insofar as the President being the spokesman or mouthpiece of the nation in foreign affairs, the facts of the case have little or nothing whatsoever to do with the conduct of negotiations or the need for secrecy in the conduct of negotiations. (See page 319 where the Court quotes a Report of the Committee on Foreign Relations, vol. 8, p. 24, in part, as follows: "The President is the constitutional representative of the United States with regards to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution.") Indeed, the facts in *Curtiss-Wright* do not elicit much commentary on presidential foreign affairs powers.

At issue in the case was a *statute* making certain arms sales illegal upon a finding by the President that a ban on those sales would serve the cause of peace. President Roosevelt made the necessary finding. Curtiss-Wright violated the law, was indicted and convicted, and on appeal challenged the constitutionality of the law on the ground that it violated the delegation doctrine, that is, that open ended delegations of authority to executive officials run afoul of the constitutional grant of all legislative power to Congress. As one writer has recently suggested, the Court may have felt obligated to roam at large since six months earlier, for the first and last time in its history, it had invoked the doctrine to overturn a pair of New Deal anti-depression measures. *Panama Refining Company* v. *Ryan*, 293 U.S. 388 (1935) and *United States* v. *Schecter Poultry Corp.*, 295 U.S. 495 (1935). See Glennon, *Constitutional Diplomacy* 18 (1990). Be that as it may, the case has become a talisman invariably invoked by Administration spokespersons regardless of political affiliation in support of unlimited presidential discretion in the foreign affairs area.

Held to the precise facts of the case, *Curtiss-Wright* stands for the propositions that the statute in question did not constitute an illicit delegation of policy origination to the President and that delegations impacting on foreign affairs are not subject to the same exacting limitations as those affecting purely domestic concerns.

Not only is that case of questionable conclusive authority on all matters of presidential powers in the area of foreign affairs, including the conduct of negotiations and the need for secrecy in the conduct of negotiations, if offers little guidance with respect to the propriety of empowering executive branch officials other than the President to negotiate with foreign entities, especially to negotiate nonpolitical, statutorily delegated economic matters, for example. In this regard and with respect to the extent of the President's independent powers to negotiate, see *United States* v. *Guy W. Capps. Inc.*, 204 F. 2d 655 (4th Cir. 1953). *aff'd on other grounds*, 348 U.S.

296 (1955). The court overturned an executive agreement between the United States and Canada concerning the export and import of potatoes that was inconsistent with the requirements of section 3 of the Agricultural Act of 1948, 62 Stat. 1248–50 (1948). The court held that Congress has the exclusive authority to regulate foreign commerce, and, accordingly, the President cannot make any agreements which are inconsistent with existing legislation.

Extreme interpretations of the significance of the *Curtiss-Wright* decision can lead to closing one's eyes to reality and to the lessons of history. In the first category, it should be noted that despite presidential forays into negotiations, so called summit meetings being the most glaring illustration, most negotiations are conducted by agents, principally, but not exclusively, State Department personnel. As negotiations increasingly deal with highly scientific subjects that fall outside traditional areas of State Department expertise, technical experts from other departments and agencies join in and become part of the negotiating team. Apparently something along these lines involving personnel of the Environmental Protection Agency took place in connection with recent United States negotiations with Canada.

The tendency to disperse negotiating authority throughout the Executive Branch has been noted by one commentator who explains the reasons for developments in this area as follows:

> The *raison d'etre* of upgraded agency-level agreements (and thus a dispersal throughout the Executive Branch of negotiating responsibilities, traditionally fulfilled by the Department of State,) has ultimately been the rapid integration of this nation into the world community. Perhaps more than any other factor, technological advances, primarily in transportation and communication, have spurred the integration process, producing a world that is smaller, in effect, than ever before. Also, the continued expansion of foreign trade and investments by U.S. interests has caused an unprecedented level of economic interdependence with other countries. As a result, events—particularly of an economic, technological/scientific, military or environmental nature—occurring beyond the borders of the U.S. that once produced few domestic consequences are increasingly having a direct impact upon a wide range of private concerns and government agencies. This has caused successive administrations, as well as Congress, to conclude that the State Department's institutional focus on international politics and diplomacy is no longer sufficient alone to handle the many complex and technical issues of transnational domestic import that must be agreed to with other states. Thus, the nondiplomatic agencies in which expertise in these highly specialized areas resides have been relied upon increasingly in the negotiation of these types of agreements. Kuchenbecker, 18 *Columbia Journal of Transnational Law* 8–10 1979.

In addition to the reality that the overwhelming number of negotiations conducted on behalf of the United States are performed by presidential agents rather than by the President himself, Congress from the beginning has vested negotiating authority in other executive officials. One of the earliest examples turned up by our research is the Act of February 20, 1792, An Act to establish the Post-Office the Post Roads within the United States. 1 Stat. 232 (1792). Section 26 of the 1792 law enabled the Postmaster General to deal with sea borne mail and, more significantly, gave him discretionary authority to "make arrangements with the postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post-offices." 1 Stat. 239.

Although the apparent successor of this early provision continues to authorize the Postal Service (now an independent establishment in the Executive Branch, not a cabinet level department) with discretionary authority to negotiate postal arrangements "with the consent of the President", 39 U.S.C. 407, the actions of the Second Congress have significance for reasons "repeatedly" noted by the Supreme Court. "We have first a construction of the Constitution made by a Congress which was to provide by legislation for the organization of the Government in accord with the Constitution which had just then been adopted, and in which there were, as representatives and senators, a considerable number of those who had been members of the Convention that framed the Constitution and presented it for ratification. * * * This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions." *Myers* v. *United States*, 272 U.S. 52, 174–75 (1926).

The precedent seemingly established by the Second Congress in giving executive officials negotiating authority has contemporary analogues. While time does not permit a definitive listing of all such provisions, current and/or historical, we note the following examples: the United States Trade Representative has the "lead responsibility for the conduct of, and shall be the chief representative of the United States for, international trade negotiations, including commodity and direct investment negotiations, in which the United States participates", 19 U.S.C. 2171(c)(1)(C); the Secretaries of Transportation and Commerce, with the advice of the Secretary of State, had and may continue to have a role in "negotiations of any agreement with foreign governments for the establishment or development of air navigation, including air routes and services", 49 U.S.C. 1462, and 49 U.S.C. App. 1301 for transfer of functions; the Chief of the Weather Bureau, under the direction of the Secretary of Commerce, among other things, was directed to "establish and coordinate the international exchanges of meteorological information required for the safety and efficiency of air navigation" and "participate in the development of an international basic meteorological reporting network, including the establishment, operation, and maintenance of reporting stations on the high seas, in polar regions, and in foreign countries in cooperation with other governmental agencies of the United States and the meteorological services of foreign countries and with persons engaged in air commerce, 49 U.S.C. 1463 and 49 U.S.C. 1301; the Secretary of State, in consultation with the Secretaries of Defense and Commerce, and the heads of other appropriate departments and agencies, "shall be responsible for conducting negotiations with other countries, including those countries not participating in the group known as the Coordinating Committee, regarding their cooperation in restricting the export of goods and technology" "which would make a significant contribution to the military potential of any country or combination of countries which would prove detrimental to the security of the United States . . .", 50 U.S.C. App. 2404(k); the Treasury Department's Office of the Assistant Secretary (Tax Policy) conducts various functions relating to international tax policies and programs, including participation in international tax treaty negotiations and in maintenance of relations with international organizations in tax matters. *U.S. Government Manual 1988-89* at 483.

These precedents have one element in common, namely, they give authority to conduct negotiations to an executive official subject ultimately to presidential control. The Secretary of the Treasury who would negotiate for fair trade in financial services under the Fair Trade in Financial Service Act of 1990 is just such an officer. See *Nixon* v. *Administrator of General Services,* 433 U.S. 425, 444-445 (1977), where the Cout held that the retention of a function within the Executive Branch but outside the Oval Office did not cause disruption and, thus, did not violate separation of powers.

A copy of the previously mentioned Kuchenbecker commentary relating to the growing practice of agency-level executive agreement is annexed hereto.

RAYMOND J. CELADA,
Senior Specialist in American Public Law.

[S. 1379, 101st Cong., 2d Sess.]

A BILL To reauthorize and amend the Defense Production Act of 1950, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Defense Production Act Amendments of 1990".

(b) TABLE OF CONTENTS.—

Sec. 1. Short title.
Sec. 2. Congressional findings.

TITLE I—AMENDMENTS TO THE DEFENSE PRODUCTION ACT OF 1950

PART A—DECLARATION OF POLICY

Sec. 101. Declaration of policy.

PART B—AMENDMENTS TO TITLE I OF THE DEFENSE PRODUCTION ACT

Sec. 111. Limitation on actions without congressional authorization.
Sec. 112. Limitations on the use of authority of the Defense Production Act.

PART C—AMENDMENTS TO TITLE III OF THE DEFENSE PRODUCTION ACT

Sec. 121. Expanding the reach of existing authorities under title III.
Sec. 122. Sales or transfers of excess industrial resources.
Sec. 123. Defense Production Act Fund.
Sec. 124. Offset policy.
Sec. 125. Annual report on impact of offsets.
Sec. 126. Assessment of subcontractor and supplier base.

PART D—AMENDMENTS TO TITLE VII OF THE DEFENSE PRODUCTION ACT

Sec. 131. Small business.
Sec. 132. Definitions.
Sec. 133. Delegation of authority; appointment of personnel.
Sec. 134. Rules, regulations, and orders.
Sec. 135. Antitrust protections for voluntary agreements initiated by the President.
Sec. 136. Information on the defense industrial base.
Sec. 137. Antitrust protections for industry consortia.
Sec. 138. Intelligence study.
Sec. 139. Exemption from Administrative Procedure Act.

PART E—TECHNICAL AMENDMENTS

Sec. 141. Priorities in contracts and orders.
Sec. 142. Loan guarantees.
Sec. 143. Investigations; records; reports; subpoenas.
Sec. 144. Employment of personnel.
Sec. 145. Authorization of appropriations.

PART F—REPEALERS AND CONFORMING AMENDMENTS

Sec. 151. Synthetic fuel action.
Sec. 152. Authorization of appropriations.
Sec. 153. Joint Committee on Defense Production.
Sec. 154. Persons disqualified for employment.
Sec. 155. Feasibility study on uniform cost accounting standards; report submitted.

Sec. 156. National Commission on Supplies and Shortages.

PART G—REAUTHORIZATION OF SELECTED PROVISIONS

Sec. 161. Authorization of appropriations.
Sec. 162. Sunset.

TITLE II—ADDITIONAL PROVISIONS TO IMPROVE INDUSTRIAL PREPAREDNESS

PART A—INDUSTRIAL CAPABILITY AND NATIONAL SECURITY

Sec. 201. Industrial capabilities assessment.

PART B—ENCOURAGING IMPROVEMENT OF THE DEFENSE INDUSTRIAL BASE

Sec. 211. Recognition of modernized production systems and equipment in contract award and administration.
Sec. 212. Procurement of critical components or critical technology items.
Sec. 213. Sense of the Congress regarding the encouragement of investment.

PART C—MISCELLANEOUS

Sec. 221. GAO study of State foreign investment incentive programs.
Sec. 222. Discouraging unfair trade practices.

TITLE III—AMENDMENT TO RELATED LAWS

Sec. 301. Defense Production Act Fund projects.

TITLE IV—FAIR TRADE IN FINANCIAL SERVICES

Sec. 401. Short title.
Sec. 402. Effectuating the principle of national treatment for banks and bank holding companies.
Sec. 403. Effectuating the principle of national treatment for securities brokers and dealers.
Sec. 404. Effectuating the principle of national treatment for investment advisers.
Sec. 405. Conforming amendments specifying that national treatment includes effective market access.

TITLE V—EFFECTIVE DATES

Sec. 501. Effective dates.

SEC. 2. CONGRESSIONAL FINDINGS.

The Congress finds that—

(1) the Defense Production Act of 1950 (50 U.S.C. App. 2061 et seq.) provides essential authority for—

(A) preserving and enhancing the defense industrial and technology base of the United States during peacetime; and

(B) mobilizing the Nation's productive capacity for national defense during periods of national emergency; and

(2) amendments to such Act are needed to—

(A) improve its utility to effectively sustain and develop the efficiency of the Nation's existing productive capacity necessary to meet national defense requirements;

(B) establish a revolving fund for improved management of the resources dedicated to defense industrial preparedness and the conduct of the programs authorized under the Act;

(C) facilitate use of such Act to foster the development of emerging technologies and advanced processes by providing appropriate protections for joint undertakings in research, development, and production; and

(D) eliminate outdated provisions that detract from the Act's usefulness as a primary set of authorities for the maintenance and enhancement of the defense industrial and technology base of the United States.

TITLE I—AMENDMENTS TO THE DEFENSE PRODUCTION ACT OF 1950

PART A—DECLARATION OF POLICY

SEC. 101. DECLARATION OF POLICY.

Section 2 of the Defense Production Act of 1950 (50 U.S.C. App. 2062) is amended to read as follows:

"SEC. 2. DECLARATION OF POLICY.

"The vitality of the industrial and technology base of the United States is a foundation of national security. It provides the industrial and technological capabilities employed to meet national defense requirements, in peacetime and in time of national emergency. In peacetime, the health of the industrial and technology base contributes to the technological superiority of our defense equipment, which is a cornerstone of our national security strategy, and the efficiency with which defense equipment is developed and produced. In times of crisis, a healthy industrial base will be able to effectively provide the graduated response needed to effectively meet the demands of the emergency.

"To meet these requirements, this Act affords to the President an array of authorities to shape defense preparedness programs and to take appropriate steps to maintain and enhance the defense industrial and technology base.".

PART B—AMENDMENTS TO TITLE I OF THE DEFENSE PRODUCTION ACT

SEC. 111. LIMITATION ON ACTIONS WITHOUT CONGRESSIONAL AUTHORIZATION.

Section 104 of the Defense Production Act of 1950 (50 U.S.C. App. 2074) is amended to read as follows:

"SEC. 104. LIMITATION ON ACTIONS WITHOUT CONGRESSIONAL AUTHORIZATION.

"No provision of this Act shall be interpreted as providing for the imposition of wage or price controls without the prior authorization of such action by a joint resolution of Congress.".

SEC. 112. LIMITATIONS ON THE USE OF AUTHORITY OF THE DEFENSE PRODUCTION ACT.

Title I of the Defense Production Act of 1950 is amended by adding at the end the following new section:

"SEC. 104. CHEMICAL OR BIOLOGICAL WARFARE.

"No provision of this Act shall be exercised or interpreted to require action or compliance by any private person to assist in any way in the production of or other involvement in chemical or biological warfare capabilities except—

"(1) in time of war, or

"(2) in time of national emergency (A) as declared by joint resolution of Congress, or (B) upon the written authorization of the President, which power to authorize may not be delegated.".

PART C—AMENDMENTS TO TITLE III OF THE DEFENSE PRODUCTION ACT

SEC. 121. EXPANDING THE REACH OF EXISTING AUTHORITIES UNDER TITLE III.

(a) GUARANTEE AUTHORITY.—Section 301 of the Defense Production Act of 1950 (50 U.S.C. App. 2091) is amended—

(1) in subsection (a)(1), by striking "to expedite production and deliveries or services under Government contracts for the procurement of materials or the performance of services for the national defense" and inserting "to expedite or expand production and deliveries or services under Government contracts for the procurement of industrial resources or a critical technology item for the national defense";

(2) by amending subsection (a)(3)(A) to read:

"(A) the guaranteed contract or operation is for industrial resources or a critical technology item which is essential to the national defense;";

(3) in subsection (a)(3)(B), by striking "the capability for the needed material or service" and inserting "the needed industrial resources or critical technology item";

(4) in subsection (e)(1)(A), by striking "Except during periods of national emergency declared by the Congress or the President" and inserting "Except as provided in subparagraph (D)";

(5) in subsection (e)(1)(C), by striking "$25,000,000" and inserting "$50,000,000"; and

(6) by adding at the end of subsection (e)(1) the following new subparagraph:

"(D) The requirements of subparagraphs (A), (B), and (C) may be waived during periods of national emergency declared by Congress or the President or upon a determination made by the President, on a nondelegable basis, that a specific guarantee must be promptly made to avert an industrial resource or critical technology shortfall that would severely impair national defense capability.".

(b) LOANS TO PRIVATE BUSINESS ENTERPRISES.—Section 302 of the Defense Production Act of 1950 (50 U.S.C. App. 2092) is amended—

(1) in subsection (a), by striking "for the procurement of materials or the performance of services for the national defense" and inserting "for the procurement of industrial resources or a critical technology item for the national defense";

(2) in subsection (c)(1), by striking "No such loans may be made under this section, except during periods of national emergency declared by the Congress or the President" and inserting "Except as provided in paragraph (4), no loans may be made under this section";

(3) in subsection (c)(3), by striking "$25,000,000" and inserting "$50,000,000"; and

(4) in subsection (c), by adding at the end the following new paragraph:

"(4) The requirements of paragraphs (1), (2), and (3) of this subsection may be waived during periods of national emergency declared by Congress or the President, or upon a determination made by the President, on a nondelegable basis, that a specific guarantee must be promptly made to avert an industrial resource or critical technology shortfall that would severely impair national defense capability.".

(c) PURCHASES AND PURCHASE COMMITMENTS.—

(1) Section 303(a) of the Defense Production Act of 1950 (50 U.S.C. App. 2093(a)) is amended to read as follows:

"(a)(1) To assist in carrying out the objectives of this Act, the President may make provision—

"(A) for purchases of or commitments to purchase an industrial resource or a critical technology item, for Government use or resale; and

"(B) for the encouragement of exploration, development, and mining of critical and strategic materials, and other materials.

"(2) Purchases for resale under this subsection shall not include that part of the supply of an agricultural commodity which is domestically produced except insofar as such domestically produced supply may be purchased for resale for industrial use or stockpiling.

"(3) No commodity purchased under this subsection shall be sold at less than—

"(A) the established ceiling price for such commodity, except that minerals, metals, and materials shall not be sold at less than the established ceiling price, or the current domestic market price, whichever is lower, or

"(B) if no ceiling price has been established, the higher of the following: (i) The current domestic market price for such commodity, or (ii) the minimum sale price established for agricultural commodities owned or controlled by the Commodity Credit Corporation as provided in section 407 of the Agricultural Act of 1949 (7 U.S.C. 1427).

"(4) No purchase or commitment to purchase any imported agricultural commodity shall specify a delivery date which is more than one year after the expiration of this section.

"(5) Except as provided in paragraph (7), the President may not execute a contract under this subsection unless the President determines that—

"(A) the industrial resource or critical technology item is essential to the national defense;

"(B) without Presidential action under authority of this section, United States industry cannot reasonably be expected to provide the capability for the needed industrial resource or critical technology item in a timely manner;

"(C) purchases, purchase commitments, or other action pursuant to this section are the most cost-effective, expedient, and practical alternative method for meeting the need; and

"(D) the United States national defense demand for the industrial resource or critical technology item is equal to, or greater than the output of domestic industrial capability which the President reasonably determines to be available for national defense, including the output to be established through the purchase, purchase commitment, or other action.

"(6) Except as provided in paragraph (7), the President shall take no action under this section unless the industrial resource shortfall which such action is intended to correct has been identified in the Budget of the United States or amendments thereto, submitted to the Congress and accompanied by a statement from the President demonstrating that the budget submission is in accordance with the provisions of the preceding sentence. Any such action may be taken only after 60 days have elapsed after such industrial resource shortfall has been identified pursuant to the preceding sentence. If the taking of any action or actions under this section to correct an industrial resource shortfall would cause the aggregate outstanding amount of all such actions for such industrial resource shortfall to exceed $50,000,000, any such action or actions may be taken only if specifically authorized by law.

"(7) The requirements of paragraphs (1) through (6) may be waived during periods of national emergency declared by Congress or the President, or upon a determination made by the President, on a nondelegable basis, that a specific purchase or purchase commitment must be promptly made to avert an industrial resource or critical technology shortfall that would severely impair national defense capability.".

(2) Section 303(b) of such Act is amended by striking "September 30, 1995" and inserting "a date that is not more than 10 years from the date such purchase, purchase commitment, or sale was initially made".

SEC. 122. SALES OR TRANSFERS OF EXCESS INDUSTRIAL RESOURCES.

Section 303(f) of the Defense Production Act of 1950 (50 U.S.C. App. 2093(f)) is amended to read as follows:

"(f) Industrial resources acquired pursuant to the provisions of this section which, in the judgment of the President, are in excess of the needs of programs under this Act, shall be sold for industrial use pursuant to such other Federal Government programs as are authorized by law or transferred to the National Defense Stockpile established by the Strategic and Critical Materials Stock Piling Act (50 U.S.C. 98 et seq.), when the President deems such action to be in the public interest. Sales or transfers made pursuant to this subsection shall be charged against or reimbursed from funds appropriated to such other Federal Government programs or the National Defense Stockpile to which such resources were sold or transferred, at the current domestic market price for such industrial resources. For the purposes of subsection (c)(2), such sales or transfers shall be considered transactions entered into pursuant to the authority of subsection (a).".

SEC. 123. DEFENSE PRODUCTION ACT FUND.

(a) IN GENERAL.—Section 304 of the Defense Production Act of 1950 (50 U.S.C. App. 2094) is amended to read as follows:

“SEC. 304. DEFENSE PRODUCTION ACT FUND.

“(a) ESTABLISHMENT OF FUND.—There is established in the Treasury of the United States a separate fund to be known as the Defense Production Act Fund (hereinafter referred to as ‘the Fund’).

“(b) MONEYS IN FUND.—The following monies shall be credited to the Fund:

“(1) All monies appropriated hereafter for the Fund, as authorized by section 711(c).

“(2) All monies received hereafter on transactions entered into pursuant to section 303.

“(c) USE OF FUND.—The Fund shall be available to carry out the provisions and purposes of this title, subject to the limitations set forth in this Act and in appropriations Acts.

“(d) DURATION OF FUND.—Monies in the Fund shall remain available until expended.

“(e) FUND BALANCE.—The Fund balance at the close of each fiscal year shall not exceed $250,000,000, excluding any monies appropriated to the Fund during that fiscal year. If at the close of any fiscal year the Fund balance exceeds such amount, the amount in excess of $250,000,000 shall be paid into the general fund of the Treasury.

“(f) FUND MANAGER.—The Secretary of the Treasury shall designate a Fund manager. The duties of the Fund manager shall include—

“(1) determining the liability of the Fund in accordance with subsection (g);

“(2) ensuring the visibility and accountability of transactions engaged in through the Fund to the Secretaries of Defense, Treasury, and Commerce, and to the Congress; and

“(3) reporting to Congress each year regarding fund activities during the previous fiscal year.

“(g) LIABILITIES AGAINST FUND.—

“(1) IN GENERAL.—When any agreement hereafter entered into pursuant to this title imposes contingent liabilities upon the United States, such liability shall be considered an obligation against the Fund. The amount of such obligation shall be determined for each fiscal year in accordance with paragraph (2).

“(2) DETERMINATION OF LIABILITY.—For purposes of paragraph (1), the amount of obligations against the Fund shall be equal to the aggregate outlays required by purchase or purchase commitment contracts or financing agreements less (A) the anticipated aggregate receipts from resale of materials purchased with moneys from the Fund, and (B) the anticipated receipts from the direct sale of materials by the producer to customers. Anticipated receipts and anticipated reductions in purchase commitments shall be included under the preceding sentence only if a written plan for sale of materials has been developed, specifying probable customers, amount, time of the sales, and sales price.”.

(b) CAPITALIZATION OF FUND.—There shall be transferred to the Defense Production Act Fund, established by subsection (a) of this section, the sum of $200,000,000 from the unobligated balance of the National Defense Stockpile Transaction Fund.

SEC. 124. OFFSET POLICY.

Section 309 of the Defense Production Act of 1950 (50 U.S.C. App. 2099) is amended—

(1) by redesignating subsections (a) and (b) as subsections (b) and (c), respectively; and

(2) by adding a new subsection (a) as follows:

"(a) Offset Policy.—

"(1) In general.—Recognizing that certain offsets for military exports are economically inefficient and market distorting, and mindful of the need to minimize the adverse effects of offsets in military exports while ensuring that the ability of United States firms to compete for military export sales is not undermined, it shall be the policy of the United States Government that—

"(A) no agency of the United States Government shall encourage, enter directly into, or commit United States firms to any offset arrangement in connection with the sale of defense goods or services to foreign governments;

"(B) United States Government funds shall not be used to finance offsets in security assistance transactions except in accordance with policies and procedures that were in existence as of the date of enactment of this Act;

"(C) nothing in this section shall prevent agencies of the United States Government from fulfilling obligations incurred through international agreements entered into prior to the enactment of this Act;

"(D) the decision whether to engage in offsets, and the responsibility for negotiating and implementing offset arrangements, resides with the companies involved; and

"(E) any exceptions to the policy stated by this section shall be approved by the President after receiving the recommendation of the National Security Council.

"(2) Consultation.—The Secretary of Defense, in coordination with the Secretary of State, shall lead an interagency team to consult with foreign nations on limiting the adverse effects of offsets in defense procurement. The Secretary of Defense shall report annually on the the date of enactment of this Act, on the results of these consultations to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Banking, Finance and Urban Affairs of the House of Representatives.".

SEC. 125. ANNUAL REPORT ON IMPACT OF OFFSETS.

Section 309 of the Defense Production Act of 1950 (50 U.S.C. App. 2099) (as amended by section 124 of this Act) is amended—

(1) in subsection (b)—

(A) by striking "(b) Not later" and inserting:

"(b) Annual Report on Impact of Offsets.—

"(1) Report required.—Not later";

"(B) by striking the second sentence; and

"(C) by adding at the end the following new paragraph:

"(2) Duties of the Secretary of Commerce.—The Secretary of Commerce shall—

"(A) prepare the report required by paragraph (1);

"(B) consult with the Secretary of Defense, the Secretary of the Treasury, the Secretary of State, and the United States Trade Representative in preparation of such report; and

"(C) function as the President's Executive Agent for carrying out the requirements of this section.";

(2) by amending subsection (c) to read as follows:

"(c) INTERAGENCY STUDIES AND RELATED DATA.—

"(1) PURPOSE OF REPORT.—Each report required under subsection (a) shall identify the cumulative effects (indirect as well as direct) of offset agreements on—

"(A) the full range of domestic defense productive capability (with special attention to the firms serving as lower-tier subcontractors or suppliers); and

"(B) the domestic defense technology base as a consequence of the technology transfers associated with such offset agreements.

"(2) USE OF DATA.—Data developed or compiled by any agency while conducting any interagency study or other independent study or analysis shall be made available to the Secretary of Commerce to facilitate the Secretary in executing his responsibilities with respect to trade offset and countertrade policy development."; and

(3) by adding at the end the following new subsections:

"(d) NOTICE OF OFFSET AGREEMENTS.—

"(1) IN GENERAL.—If a United States firm enters into a contract for the sale of a weapon system or defense-related item to a foreign country or foreign firm and such contract is subject to an offset agreement exceeding $5,000,000 in value, such firm shall furnish to the official designated in the regulations promulgated pursuant to paragraph (2) information concerning such sale.

"(2) REGULATIONS.—The information to be furnished shall be prescribed in regulations promulgated by the Secretary of Commerce. Such regulations shall provide protection from public disclosure for such information, unless public disclosure is subsequently specifically authorized by the firm furnishing the information. Nothing in this paragraph authorizes the withholding of such information from the Congress.

"(e) CONTENTS OF REPORT.—

"(1) IN GENERAL.—Each report under subsection (b) shall include—

"(A) a net assessment of the elements of the industrial base and technology base covered by the report;

"(B) recommendations for appropriate remedial action under the authorities provided by this Act, or other law or regulations;

"(C) a summary of the findings and recommendations of any interagency studies conducted during the reporting period under subsection (c);

"(D) a summary of offset arrangements concluded during the reporting period for which information has been furnished pursuant to subsection (d); and

"(E) a summary and analysis of any bilateral and multilateral negotiations relating to use of offsets completed during the reporting period.

"(2) ALTERNATIVE FINDINGS OR RECOMMENDATIONS.—Each report shall include any alternative findings or recommendations offered by any departmental Secretary, agency head, or the United States Trade Representative to the Secretary of Commerce.

"(f) UTILIZATION OF ANNUAL REPORT IN NEGOTIATIONS.—The findings and recommendations of the reports required by subsection (b), and any interagency reports and analyses shall be considered by representatives of the United States during bilateral and multilateral negotiations to minimize the adverse effects of offsets.".

SEC. 126. ASSESSMENT OF SUBCONTRACTOR AND SUPPLIER BASE.

Title III of the Defense Production Act of 1950 is amended by adding at the end the following new section:

"SEC. 310. ASSESSMENT OF SUBCONTRACTOR AND SUPPLIER BASE.

"(a) IN GENERAL.—

"(1) REPORT REQUIRED.—At the intervals prescribed by subsection (b), the President shall issue a report of an assessment of those subsectors of the economy of the United States which have been identified as being critical to the development and production of components required for the production of weapons systems and other items of military equipment, and the provision of services, essential to the national defense. The report may provide specific policy recommendations to correct deficiencies identified in the assessment, which would help to strengthen domestic sources.

"(2) MATTERS TO BE CONSIDERED.—The assessment shall consider—

"(A) capacity of domestic sources, especially commercial firms, to fulfill peacetime requirements and graduated mobilization requirements for various items of supply and services;

"(B) trends relating to the capabilities of domestic sources to meet such peacetime and mobilization requirements;

"(C) extent of foreign dependencies for various items of military materiel; and

"(D) reasons for the decline of the capabilities of selected sectors of the United States economy necessary to meet peacetime and mobilization requirements, including stability of defense requirements, acquisition policies, vertical integration of various segments of the industrial base, superiority of foreign technology and production efficiencies, foreign government support of nondomestic sources, and offset arrangements.

"(b) TIME FOR ISSUANCE.—(1) The report required by subsection (a) shall be issued not later than July 1 of each odd-numbered year, based upon data from the prior fiscal year and such prior fiscal years as may be appropriate.

"(2) The first report under this section shall be issued by July 1, 1993.".

PART D—AMENDMENTS TO TITLE VII OF THE DEFENSE PRODUCTION ACT

SEC. 131. SMALL BUSINESS.

Section 701 of the Defense Production Act of 1950 (50 U.S.C. App. 2151) is amended to read as follows:

"SEC. 701. SMALL BUSINESS.

"(a) PARTICIPATION.—Small business concerns shall be given the maximum practicable opportunity to participate as contractors, and subcontractors at various tiers, in all programs to maintain and strengthen the Nation's industrial base and technology base undertaken pursuant to this Act.

"(b) ADMINISTRATION OF ACT.—In administering the programs, implementing regulations, policies, and procedures under this Act, requests, applications, or appeals from small business concerns shall, to the maximum extent practicable, be expeditiously handled.

"(c) ALLOCATIONS UNDER SECTION 101.—Whenever the President invokes the power to allocate any material pursuant to section 101 of this Act, small business concerns shall be accorded, so far as practicable, a fair share of such material, in proportion to the share received by such business concerns under normal conditions, giving such special consideration as may be possible to new small business concerns or individual firms facing undue hardship.".

SEC. 132. DEFINITIONS.

Section 702 of the Defense Production Act of 1950 (50 U.S.C. App. 2152) is amended to read as follows:

"SEC. 702. DEFINITIONS.

"As used in this Act—

"(1) CRITICAL COMPONENT.—The term 'critical component' shall include such components, subsystems, systems, and related special tooling and test equipment essential to the production, repair, maintenance, or operation of weapon systems or other items of military equipment as are identified by the Secretary of Defense as being essential to the execution of the national security strategy of the United States.

"(2) CRITICAL TECHNOLOGY.—The term 'critical technology' shall include a technology that is included in one or more of the plans submitted pursuant to section 2508 of title 10, United States Code, unless subsequently deleted, or such other emerging or dual use technology as may be designated by the President. The President shall cause an unclassified list of critical or emerging technologies to be maintained and published at least annually in the Federal Register.

"(3) CRITICAL TECHNOLOGY ITEM.—The term 'critical technology item' shall mean materials directly employing, derived from, or utilizing a critical technology.

"(4) DEFENSE CONTRACTOR.—The term 'defense contractor' means any person who enters into a contract with the United States to furnish materials, industrial resources, or a critical technology, or to perform services for the national defense.

"(5) Domestic source.—The term 'domestic source' means a business entity—

"(A) that performs in the United States or Canada substantially all of the research and development, engineering, manufacturing, and production activities required of such firm under a contract with the United States relating to a critical component or a critical technology item, and

"(B) that procures from entities described in subparagraph (A) substantially all of the components and assemblies required under a contract with the United States relating to a critical component or critical technology item.

"(6) Facilities.—The term 'facilities' includes all types of buildings, structures, or other improvements to real property (but excluding farms, churches or other places of worship, and private dwelling houses), and services relating to the use thereof.

"(7) Industrial resources.—The term 'industrial resources' means materials, services, processes, or manufacturing equipment (including the processes, technologies, and ancillary services for the use of such equipment) needed to establish or maintain an efficient and modern national defense industrial capacity.

"(8) Materials.—The term 'materials' shall include raw materials (including minerals, metals, and advanced processed materials), commodities, articles, components (including critical components), products, items of supply, and such technical information or services ancillary to the use thereof.

"(9) National defense.—The term 'national defense' means programs for military and energy production or construction, military assistance to any foreign nation, stockpiling, space, and directly related activity.

"(10) Nondomestic source.—The term 'nondomestic source' means a business entity other than a 'domestic source'.

"(11) Person.—The term 'person' includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative thereof, or any State or local government or agency thereof.

"(12) Services.—The term 'services' includes any effort that is needed or incidental to—

"(A) the development, production, processing, distribution, delivery, or use of an industrial resource or a critical technology item, or

"(B) the construction of facilities.".

SEC. 133. DELEGATION OF AUTHORITY; APPOINTMENT OF PERSONNEL.

Section 703 of the Defense Production Act of 1950 (50 U.S.C. App. 2153) is amended to read as follows:

"SEC. 703. DELEGATION AND CIVILIAN PERSONNEL.

"(a) Delegation of Authority.—Except as otherwise specifically provided, the President may—

"(1) delegate any power or authority conferred upon him by this Act to any civilian officer of the Government appointed by and with the advice and consent of the Senate;

"(2) except with regard to title I, authorize redelegation by that officer to an officer or employee of that officer who—

"(A) if a member of the armed forces, is a general or flag officer; or

"(B) if a civilian, is serving in a position in the grade GS–16 or above (or in a comparable or higher position under any other schedule for civilian officers or employees); and

"(3) establish such new agencies as may be necessary to manage Federal emergency preparedness programs.

"(b) Civilian Personnel.—Any officer or agency head may appoint civilian personnel without regard to section 5331(b) of title 5, United States Code, and without regard to the provisions of such title governing appointments in the competitive service, and may fix the rate of basic pay for such personnel without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS–18 of the General Schedule, as the President deems appropriate to carry out the provisions of this Act.".

SEC. 134. RULES, REGULATIONS, AND ORDERS.

Section 704 of the Defense Production Act of 1950 (50 U.S.C. App. 2154) is amended to read as follows:

"SEC. 704. RULES, REGULATIONS, AND ORDERS.

"The President may make such rules, regulations, and orders as he deems appropriate to carry out the provisions of this Act. This authority shall be exercised in conformity with section 709 of this Act.".

SEC. 135. ANTITRUST PROTECTIONS FOR VOLUNTARY AGREEMENTS INITIATED BY THE PRESIDENT.

Section 708 of the Defense Production Act of 1950 (50 U.S.C. App. 2158) is amended—

(1) in subsection (a), by striking "subsection (j) of section 708A" and inserting "subsection (i) of section 708A";

(2) by striking subsection (b) and inserting the following:

"(b) As used in this section, the term—

"(1) 'antitrust laws' means—

"(A) the Sherman Act (15 U.S.C. 1 et seq.);

"(B) the Clayton Act (15 U.S.C. 12 et seq.);

"(C) the Federal Trade Commission Act (15 U.S.C. 41 et seq.);

"(D) sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9);

"(E) the Act of June 19, 1936, chapter 592 (15 U.S.C. 13, 13a, 13b, and 21a); and

"(F) the Webb-Pomerene Act (15 U.S.C. 61–65).

"(2) 'plan of action' means any of one or more documented methods adopted by participants in an existing voluntary agreement to implement that agreement.";

(3) in subsection (c)(1)—

(A) by striking "Except as otherwise provided in section 708A(o), upon" and inserting in lieu thereof "Upon"; and

(B) by inserting "and plans of action" after "voluntary agreements";

(4) in subsection (c)(2), by striking out the last sentence;

(5) in subsection (d)(1), by striking ", and the meetings of such committees shall be open to the public." in the second sentence thereof the inserting in lieu thereof ". Meetings of such committees shall be open to the public unless the individual designated by the President in subsection (c)(2) finds that the matter or matters to be discussed at such meetings fall within the purview of matters described in subsection (b)(1), (b)(3), or (b)(4) of section 552 of title 5, United States Code.";

(6) in subsection (d)(2), by striking out "section 552 (b)(1) and (b)(3)" and inserting in lieu thereof subsections (b)(1), (b)(3), and (b)(4) of section 552";

(7) in subsection (e)(1), by inserting "and plans of action" after "voluntary agreements";

(8) in subsection (e)(3)—

(A) in subparagraph (D), by striking out "subsection (b)(1) or (b)(3) of section 552" and inserting in lieu thereof "subsection (b)(1), (b)(3), or (b)(4) of section 552"; and

(B) in subparagraph (G), by striking out "subsections (b)(1) and (b)(3) of section 552" and inserting in lieu thereof "subsection (b)(1), (b)(3), and (b)(4) of section 552";

(9) in subsections (f) and (g)—

(A) by inserting "or plan of action" after "voluntary agreement" each place it appears; and

(B) by inserting "or plan" after "the agreement" each place it appears;

(10) in subsection (h)—

(A) by inserting "and plans of action" after "voluntary agreements";

(B) by inserting "or plan of action" after "voluntary agreement" each place it appears;

(C) in subsection (h)(3) by striking out "subsections (b)(1) and (b)(3) of section 552" and inserting in lieu thereof "subsections (b)(1), (b)(3), and (b)(4) of section 552"; and

(D) in subsections (h)(7) and (h)(8) by striking out "subsection (b)(1) or (b)(3) of section 552" and inserting in lieu thereof "subsections (b)(1), (b)(3), or (b)(4) of section 552";

(11) by striking subsection (j) and inserting the following:

"(j)(1) There shall be available as a defense for any person to any civil or criminal action brought under the antitrust laws (or any similar law of any State) with respect to any action taken to develop or carry out any voluntary agreement or plan of action under this section (provided that such action was not taken for the purpose of injuring competition) that—

"(A) such action was taken—

"(i) in the course of developing either a voluntary agreement, the making of which was initiated by the President, or a plan of action adopted thereunder, or

"(ii) to carry out either a voluntary agreement authorized and approved in accordance with this section, the making of which was initiated by the President, or a plan of action adopted thereunder, and

"(B) such person complied with the requirements of this section and the rules promulgated hereunder, and acted in accordance with the terms of the voluntary agreement or plan of action.

"(2) Except in the case of actions taken to develop a voluntary agreement or plan of action, the defense provided in this subsection shall be available only if and to the extent that the person asserting the defense demonstrates that the action was specified in, or within the reasonable contemplation of an approved voluntary agreement the making of which was initiated by the President or any approved plan of action adopted thereunder.

"(3) Persons interposing the defense provided by this subsection shall have the burden of proof upon the elements of the defense, except that the burden shall be on the person against whom the defense is asserted with respect to whether the action was taken for the purpose of injuring competition.";

(12) in subsection (k), by inserting "and plans of action" after "voluntary agreements" each place it appears;

(13) in subsection (l), by inserting "or plan of action" after "voluntary agreement"; and

(14) by adding a new subsection (o), as follows:

"(o) In any action in any Federal or State court for breach of contract, there shall be available as a defense that the alleged breach of contract was caused predominantly by action taken during an emergency to carry out a voluntary agreement or plan of action authorized and approved in accordance with this section.".

SEC. 136. INFORMATION ON THE DEFENSE INDUSTRIAL BASE.

Title VII of the Defense Production Act is amended by inserting after section 705 the following:

"SEC. 705A. INFORMATION ON THE DEFENSE INDUSTRIAL BASE.

"(a) IN GENERAL.—The President shall implement a systematic, continuous procedure to collect and analyze information necessary to evaluate the adequacy of industrial capacity and capability in items and technologies essential to the execution of the national security strategy of the United States. Information generated by such procedure shall constitute a basis for decisions made with respect to the use of authority under title III and shall be integrated into the decisionmaking process pertaining to the use of such authority.

"(b) SOURCES OF INFORMATION.—

"(1) CONSULTATION REGARDING THE CENSUS OF MANUFACTURERS.—The Bureau of the Census shall consult with the Office of the Secretary of Defense and the Federal Emergency Management Agency with a view to improving the application of information derived from the Census of Manufacturers to the purposes of this section. Such consultations shall address improvements in the level of detail, timeliness and availability of input/output analyses derived from the Census of Manufacturers necessary to facilitate the purposes of this section.

"(2) ADDITIONAL DATA.—The President shall implement a systematic, continuous procedure to collect and analyze information regarding the extent of foreign dependence in industrial parts, components and technologies essential to defense production. Such procedure shall address defense production with respect to the operations of prime contractors and at least the first two tiers of subcontractors. To the extent feasible and appropriate, the President shall build upon existing methods of data collection and analysis and shall integrate information available from intelligence agencies with respect to industrial and technological conditions in foreign countries. In establishing such procedure, the Secretary may place initial emphasis on the production of parts and components relating to priority lists such as the Commanders' in Chief Critical Items List and the technologies identified as critical in the annual defense critical technologies plan submitted pursuant to section 2508 of title 10, United States Code.

"(c) AUTHORIZATION.—There are authorized to be appropriated such sums as may be necessary to carry out the purposes of this section.".

SEC. 137. ANTITRUST PROTECTIONS FOR INDUSTRY CONSORTIA.

Section 708A of the Defense Production Act of 1950 (50 U.S.C. App. 2158a) is amended to read as follows:

"SEC. 708A. INDUSTRY CONSORTIA.

"(a) ANTITRUST PROTECTION.—The President may authorize the establishment of industry consortia, in accordance with subsection (e), to provide industrial resources or critical technology items required for the preservation or enhancement of the industrial or technology base of the United States essential to the execution of the national security strategy of the United States. Except as provided in subsection (i) of this section, no action may be brought under the antitrust laws against any participant in an industry consortium for good faith activities conducted in determining whether to establish, in establishing such a consortium, or in undertaking an action if the action is within the scope of the charter of the consortium.

"(b) DEFINITIONS.—As used in this section—

"(1) The term 'antitrust laws' means—

"(A) the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies and for other purposes', approved July 2, 1890, commonly referred to as the 'Sherman Act' (15 U.S.C. 1 et seq.);

"(B) the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes', approved October 15, 1914, commonly referred to as the 'Clayton Act' (15 U.S.C. 12 et seq.);

"(C) the Federal Trade Commission Act (15 U.S.C. 41 et seq.);

"(D) sections 73 and 74 of the Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', approved August 27, 1894, commonly referred to as the 'Wilson Tariff Act' (15 U.S.C. 8 and 9);

"(E) the Act of June 19, 1936, chapter 592 (15 U.S.C. 13, 13a, 13b, and 21a);

"(F) the Act entitled 'An Act to promote export trade and for other purposes', approved April 10, 1918, commonly referred to as the 'Webb-Pomerene Act' (15 U.S.C. 61-65); and

"(G) similar laws enacted by the several States.

"(2) The term 'flexible manufacturing network' means a specified program relating to the joint development, engineering, and production of one or more products by the network's participants for their common benefit, including—

"(A) the coordination of the individual engineering, purchasing, manufacturing, quality assurance, inventory control, and other activities by the participants reasonably required to attain the network's specified program objectives, or the joint undertaking of such activities by two or more of the network's participants;

"(B) the collection and sharing of information among the network's participants relating to manufacturing capacity, production costs, and distribution capabilities for potential markets for the specified products to be produced by such network reasonably required to attain the network's specified program objectives; and

"(C) the collection and sharing of such other technical or business information as may be reasonably required to undertake the network's specified program.

"(3) The term 'industry consortium' means an arrangement among two or more persons for the purpose of undertaking a specific program of basic research, research and development, production, or any specified combination of the foregoing activities, or a flexible manufacturing network, relating directly to industrial resources or critical technology items required for the preservation or enhancement of the industrial or technology base of the United States essential to the execution of the national security strategy of the United States. Such persons may include for-profit business concerns, not-for-profit entities, and educational institutions.

"(c) FORMATION OF INDUSTRY CONSORTIUM.—(1) Except as provided in paragraph (4), persons in the private sector interested in forming an industry consortium may make application to the Attorney General in a form and containing such information as required by the regulations issued pursuant to subsection (g).

"(2) Promptly after an application is received, the Attorney General shall publish a notice in the Federal Register announcing that an application for the establishment of an industry consortium has been submitted, identifying each participating person, describing the activities to be undertaken by such consortium, and providing such other information as may be required by the regulations issued pursuant to subsection (g).

"(3) A copy of the application shall be transmitted by the Attorney General to the Chairman of the Federal Trade Commission.

"(4) Two or more small business concerns shall be deemed to have formed a flexible manufacturing network or other industry consortia conforming to the requirements of subsection (d) of this section, if—

"(A) the aggregate of the total number of employees (or the 3-year annual gross receipts) of each small business concern participating in the network or consortia does not exceed the smallest numerical size standard for an individual small business concern established by the Small Business Administration pursuant to section 3(a) of the Small Business Act (15 U.S.C. 632(a)) for the Standard Industrial Classification which includes the activities to be undertaken by such network or consortia;

"(B) notice has been given to the Attorney General in a form and containing such information as required by the regulations issued pursuant to subsection (g) within 10 calendar days of any meeting at which such small business concerns established such flexible manufacturing network or industry consortia; and

"(C) the Attorney General has not given notice to such small business flexible manufacturing network or industry consortia to cease operations for failure to have established a network or consortia meeting the requirements of subsection (d) or for failure to comply with the regulations issued pursuant to subsection (g).

"(d) CRITERIA FOR APPROVING CONSORTIUM.—(1) A proposed consortium may be approved by the President if it is determined that such consortium—

"(A) will provide at least one domestic source for industrial resources or critical technology items required for the preservation or enhancement of the industrial or technology base essential to the execution of the national security strategy of the United States,

"(B) will not constitute unfair competition or a substantial restraint of trade with respect to other persons within the United States who may be sources of the same industrial resources or critical technology items, and

"(C) will not unreasonably increase, stabilize, or depress prices for the industrial resources or critical technology items that are the subject matter of such consortium's proposed activities.

"(2) Such application for the establishment of an approved industry consortium shall be reviewed by the Attorney General, the Chairman of the Federal Trade Commission, and such other officers of the Executive as may be designated by the President in accordance with the requirements of paragraph (1) and such other evaluation criteria as may be specified in the regulations promulgated pursuant to subsection (g).

"(3) Not later than 90 calendar days after the receipt of an application in accordance with subsection (c)(2) and not earlier than 30 calendar days after the publication of the notice required by subsection (c)(2), the application shall be approved or disapproved. The reasons for any disapproval shall be specified in writing.

"(4) Approval of an application shall be evidenced by the issuance of a charter which shall specify any special terms, conditions, or limitations which are deemed necessary by the President to assure compliance with the requirements of the section.

"(5) Upon approval of an industry consortium, the President shall designate a Federal official as the principal liaison to such consortium.

"(e) CONSORTIUM ADVISORY COUNCIL.—An industry consortium is authorized to organize an advisory council, specifying the membership, functions, and operating procedures of such council in its application.

"(f) CHARTER.—

"(1) MODIFICATION.—The charter of an industry consortium may be modified during its term. A request for a modification to the charter shall be considered in the same manner as an original charter application. An approved charter modification shall be implemented by the consortium within 30 calendar days of the receipt of a notice of such modification, or the consortium shall lose its protections under subsection (a).

"(2) TERMINATION.—(A) An industry consortium may be terminated by the President upon a finding that the industry consortium is no longer conducting its activities in conformity with this section or the terms of the consortium's charter. Such notice shall specify the reasons for the determination to terminate the consortium, and afford the consortium at least 30 calendar days to respond, in accordance with appeal procedures specified in the regulations promulgated pursuant to subsection (g).

"(B) An industry consortium may voluntarily terminate its charter upon providing notice of termination (including an effective date) to the Federal official assigned as the principal liaison to the consortium. Upon the effective date of the termination of its charter, the consortium shall lose its protections under subsection (a).

"(g) REGULATIONS.—(1) The President shall promulgate regulations to implement this section. The preparation of such regulations, and modifications thereto, shall include the participation of the Attorney General, the Chairman of the Federal Trade Commission, and such other officers of the Federal Government as the President may deem appropriate.

"(2) In addition to regulations required by this section and such matters as the President deems appropriate for the effective administration of the program, the regulations required by paragraph (1) shall address the following matters:

"(A) Except as provided in subsection (c)(4), persons interested in establishing an industry consortium shall furnish to the Attorney General and the Chairman of the Federal Trade Commission—

"(i) a notice within 5 calendar days of initiating discussions among the prospective participants in the consortium,

"(ii) a notice of and the opportunity for representatives of the Attorney General and the Chairman of the Federal Trade Commission to participate in all subsequent meetings, and

"(iii) a transcript of the proceedings of each such meeting.

"(B) Opportunity shall be provided for designated Government representatives to attend any meeting sponsored by such consortium.

"(C) Opportunity for public attendance in such consortium meetings shall be provided, unless the matters to be discussed at such meetings fall within a category described in paragraph (1), (3), or (4) of section 552(b) of title 5, United States Code.

"(D) Access shall be provided for inspecting and copying, at reasonable times and upon reasonable notice, the records of the industry consortium by representatives of the Attorney General, the Chairman of the Federal Trade Commission, and the Federal official designated as the principal liaison to such industry consortium, pursuant to subsection (d)(5).

"(E) Public access shall be provided to the Government's records relating to the establishment or conduct of an industry consortium, subject to the limitations of paragraphs (1), (3), and (4) of section 552(b) of title 5, United States Code.

"(h) EXEMPTION FROM FEDERAL ADVISORY COMMITTEE ACT.—The activities of an industry consortium (including any advisory council established by such consortium) are exempt from the provisions of the Federal Advisory Committee Act (5 U.S.C. App.), and the regulations promulgated thereunder, if such activities are conducted in compliance with this section, the regulations promulgated pursuant to subsection (g), and the terms of the consortium's charter.

"(i) REMEDIES.—(1) An industry consortium found to be operating outside the scope and limitations of its charter issued pursuant to this section shall be subject to criminal or civil actions under the antitrust laws as defined in subsection (b) of this section.

"(2) Any person who is aggrieved with respect to any act or failure to act committed in connection with the formation or operation of an industry consortium may bring a civil action for injunctive relief if—

"(A) such act or omission occurred—

"(i) in the course of forming an industry consortium pursuant to subsection (c), or

"(ii) while undertaking the activities of the consortium pursuant to its charter, and

"(B) the person committing such act or omission failed to comply with the scope and limitations of its charter or the requirements of this section.

"(3) A person injured as a result of an act or omission described in paragraph (2) may be awarded—

"(A) actual damages, including interest on such damages, and

"(B) in the case of any successful action to enforce liability under this section, the costs of such action together with reasonable attorney's fees.

"(4) Any action commenced under this subsection shall proceed as if it were an action commenced under section 4 or section 16 of the Clayton Act, except that the standards applicable to the industry consortium shall be the requirements of this section, the regulations promulgated pursuant to subsection (g) and the charter of such consortium. The remedies provided in this subsection shall be the exclusive remedies available to a plaintiff.

"(5) Any action under paragraph (2) shall be brought within 2 years of the discovery of the facts giving rise to the course of action, but not later than 4 years from the date the cause of action arises.

"(6) In any action brought under this subsection, if the court finds that the challenged conduct was undertaken by the industry consortium within the scope and limitations of its charter and the requirements of this section and that the action was brought for purposes of harassment or was otherwise without merit, the court may award to the person against whom the action is brought all costs of defending such action (including reasonable attorney's fees).".

SEC. 138. INTELLIGENCE STUDY.

(a) IN GENERAL.—In order to assist the Congress in its oversight responsibilities with respect to section 721 of the Defense Production Act of 1950 (50 U.S.C. App. 2170), the Central Intelligence Agency jointly with the Federal Bureau of Investigation shall complete and furnish to the Congress within one year after the date of enactment of this section and upon the expiration of every 4 years thereafter a report which—

(1) evaluates whether there is credible evidence of a coordinated strategy by one or more countries or companies to acquire United States companies involved in research, development, or production of critical technologies for which the United States is a leading producer; and

(2) evaluates whether there are industrial espionage activities directed by foreign governments against private United States companies aimed at obtaining commercial secrets related to critical technologies;

(b) DEFINITION.—For purposes of this section, the term "critical technologies" means technologies identified under title VI of the National Science and Technology Policy, Organization, and Priorities Act of 1976 or other critical technology, critical components, or critical technology items essential to national defense identified pursuant to section 705A of the Defense Production Act.

(c) RELEASE OF UNCLASSIFIED STUDY.—The report required by this section may be classified. An unclassified version of the report shall be available to the public.

SEC. 139. EXEMPTION FROM ADMINISTRATIVE PROCEDURE ACT.

Section 709 of the Defense Production Act of 1950 (50 U.S.C. App. 2159) is amended to read as follows:

"SEC. 709. EXEMPTION FROM ADMINISTRATIVE PROCEDURE ACT.

"Any rule, regulation, order, or amendment thereto issued under the authority of this Act shall not be subject to the requirements of sections 551 through 559 of title 5, United States Code. Each proposed rule or regulation, and each amendment thereto, shall be published for public comment in the Federal Register in conformity with the requirements of section 22 of the Office of Federal Procurement Policy Act (41 U.S.C. 418b) and chapter 6 of title 5, United States Code.".

PART E—TECHNICAL AMENDMENTS

SEC. 141. PRIORITIES IN CONTRACTS AND ORDERS.

Section 101 of the Defense Production Act of 1950 (50 U.S.C. App. 2071) is amended—

(1) in subsection (a)(2) by striking "materials and facilities" and inserting "materials, services, and facilities";

(2) in subsection (c)(1) by striking "supplies of materials and equipment" and inserting "materials, equipment, and services";

(3) by striking paragraphs (2) and (3) and inserting the following new paragraph:

"(2) The authority granted by this subsection may not be used to require priority performance of contracts or orders, or to control the distribution of any supplies of materials, service, and facilities in the marketplace, unless the President finds that—

"(A) such materials, services, and facilities are scarce, critical, and essential—

"(i) to maintain or expand exploration, production, refining, transportation,

"(ii) to conserve energy supplies; or

"(iii) to construct or maintain energy facilities; and

"(B) maintenance or expansion of exploration, production, refining, transportation, or conservation of energy supplies or the construction and maintenance of energy facilities cannot reasonably be accomplished without exercising the authority specified in paragraph (1) of this subsection."; and

(d) by redesignating paragraph (4) as paragraph (3).

SEC. 142. LOAN GUARANTEES.

Section 301(e)(2)(B) of the Defense Production Act of 1950 (50 U.S.C. App. 2091(e)(2)(B)) is amended by striking "and to the Committees on Banking and Currency of the respective Houses" and inserting "and to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Banking, Finance and Urban Affairs of the House of Representatives".

SEC. 143. INVESTIGATIONS; RECORDS; REPORTS; SUBPOENAS.

Section 705 of the Defense Production Act of 1950 (50 U.S.C. App. 2155) is amended—

(1) in subsection (a), by striking "subpena" and inserting "subpoena";

(2) by redesignating subsections (c), (d), (e), and (f) as subsections (b), (c), (d), and (e), respectively;

(3) in subsection (c) (as redesignated by paragraph (2)), by striking "$1,000" and inserting "$10,000"; and

(4) in subsection (d) (as redesignated by paragraph (2)), by striking all after the first sentence.

SEC. 144. EMPLOYMENT OF PERSONNEL.

Section 710 of the Defense Production Act of 1950 (50 U.S.C. App. 2160) is amended—

(1) in subsection (b), by striking paragraph (6) and inserting the following:

"(6)(A) The Secretary of the Department or head of the agency making the appointment shall publish a notice in the Federal Register including the name of the appointee, the employing department or agency, the title of the position to which such individual is being appointed, the name of such individual's employer when selected for appointment, and a statement that the individual has made a filing in accordance with subparagraph (B) which is available for inspection.

"(B) Each individual selected for appointment under the authority of this subsection shall furnish to the departmental Secretary or agency head making the appointment—

"(i) a list of the names of each corporation, partnership, or other business in which such individual has an interest, and

"(ii) a list of any financial interest such individual had during the 60-day period preceding such appointment, including any office or directorship held in a corporation.

"(C) Each individual shall submit the information described in subparagraph (B) annually on the anniversary of such individual's appointment.";

(2) in paragraph (7) of subsection (b)—

(A) by striking "Chairman of the United States Civil Service Commission" and inserting "Director of the Office of Personnel Management";

(B) by striking "and the Joint Committee on Defense Production"; and

(3) in paragraph (8) of subsection (b), by striking "transportation and not to exceed $15 per diem in lieu of subsistence while away from their homes and regular places of business pursuant to such appointment" and inserting "reimbursement for travel, subsistence, and other necessary expenses incurred by them in carrying out the functions for which they were appointed in the same manner as persons employed intermittently in the Federal Government are allowed expenses under section 5703 of title 5, United States Code".

SEC. 145. AUTHORIZATION OF APPROPRIATIONS.

Section 711(a)(1) of the Defense Production Act of 1950 (50 U.S.C. App. 2161) is amended by striking "Bureau of the Budget" and inserting "Office of Management and Budget".

PART F—REPEALERS AND CONFORMING AMENDMENTS

SEC. 151. SYNTHETIC FUEL ACTION.

Section 307 of the Defense Production Act of 1950 (50 U.S.C. App. 2097) is repealed.

SEC. 152. AUTHORIZATION OF APPROPRIATIONS.

Section 711 of the Defense Production Act of 1950 (50 U.S.C. App. 2161) is amended—

(1) by striking subsection (b),

(2) by striking "(a)(1) Except as provided in paragraph (2) and paragraph (4)" and inserting "(a) Except as provided in subsection (c)",

(3) by striking in subsection (a) in the parenthetical "and for the payment of interest under subsection (b) of this section", and

(4) by striking paragraph (2) and redesignating paragraph (3) as subsection (b), and

(5) by striking subparagraph (B) of paragraph (4) and redesignating paragraph (4)(A) as subsection (c).

SEC. 153. JOINT COMMITTEE ON DEFENSE PRODUCTION.

Section 712 of the Defense Production Act of 1950 (50 U.S.C. App. 2162) is repealed.

SEC. 154. PERSONS DISQUALIFIED FOR EMPLOYMENT.

Section 716 of the Defense Production Act of 1950 (50 U.S.C. App. 2165) is repealed.

SEC. 155. FEASIBILITY STUDY ON UNIFORM COST ACCOUNTING STANDARDS; REPORT SUBMITTED.

Section 718 of the Defense Production Act of 1950 (50 U.S.C. App. 2167) is repealed.

SEC. 156. NATIONAL COMMISSION ON SUPPLIES AND SHORTAGES.

Section 720 of the Defense Production Act of 1950 (50 U.S.C. App. 2169) is repealed.

PART G—REAUTHORIZATION OF SELECTED PROVISIONS

SEC. 161. AUTHORIZATION OF APPROPRIATIONS.

Section 711(c) of the Defense Production Act of 1950 (as amended by section 143 of this Act) is amended to read as follows:

"(c) There are authorized to be appropriated for fiscal years 1991, 1992, and 1993 not to exceed $250,000,000 to carry out the provisions of sections 301, 302, and 303 of this Act.".

SEC. 162. SUNSET.

Section 717 of the Defense Production Act of 1950 (50 U.S.C. App. 2166) is amended to read as follows:

"SEC. 717. SUNSET.

"(a) In General.—The following provisions of this Act shall terminate at the close of September 30, 1993:

"(1) Title I of this Act, and all authority conferred thereunder.

"(2) Sections 301, 302, 303, 304 of this Act, and all authority conferred thereunder.

"(3) Sections 701, 702, 703, 704, 705, 706, 707, 708, and 711 of this Act, and all authority conferred thereunder.

"(b) Expired Provisions.—The following provisions of this Act terminate at the close of June 30, 1953:

"(1) Title II and title VI of this Act, and all authority conferred thereunder.

"(2) Title IV and title V of this Act, and all authority conferred thereunder.

"(c) Continuous Effect.—Except as otherwise provided, all other provisions of this Act, and all authority conferred thereunder, shall remain in effect.

"(d) Savings Provision.—The termination of any section of this Act, or any agency or corporation utilized under this Act shall not affect the disbursement of funds under, or the carrying out of, any contract, guarantee, commitment or other obligation entered into pursuant to this Act prior to the date of such termination, or the taking of any action necessary to preserve or protect the interests of the United States in any amounts advanced or paid out in carrying on operations under this Act, or the taking of any action (including the making of new guarantees) determined by a guaranteeing agency to be necessary to accomplish the orderly liquidation, adjustment or settlement of any loans guaranteed under this Act, including actions considered necessary to avoid undue hardship to borrowers in reconverting to normal civilian production; and all of the authority granted to the President, guaranteeing agencies, and fiscal agents under section 301 of this Act shall be applicable to actions taken pursuant to the authority contained in this subsection.".

TITLE II—ADDITIONAL PROVISIONS TO IMPROVE INDUSTRIAL PREPAREDNESS

PART A—INDUSTRIAL CAPABILITY AND NATIONAL SECURITY

SEC. 201. INDUSTRIAL CAPABILITIES ASSESSMENT.

(a) POLICY.—The national security of the United States would benefit from greater integration of national economic policies (including tax and trade) and national security policies.

(b) CONDUCT ASSESSMENT.—The President shall promptly conduct, through such means as may be appropriate, an Industrial Capabilities Assessment as described in subsection (c).

(c) MATTERS TO BE ASSESSED.—The assessment required by subsection (b) shall include:

(1) An analysis, on an ongoing basis, of the demands to be placed upon industry by the national defense plans and industry's capabilities to fulfill those expectations in peacetime as well as in time of war or national emergency.

(2) A review of major Government policies and their impact on the defense industrial and technology base.

(3) A process for periodic industry-wide assessment of technological advancement and production capabilities in relation to national security objectives.

(4) A review of existing industrial policy objectives, laws, and regulations, and recommendations to the President for their modification to foster industrial innovation, modernization, and productivity.

(5) Proposals for selectively expanding national defense production to respond to graduated levels of mobilization.

(6) One or more exercises to assess the capability of the defense industry's capability to respond to increased demands for defense materiel and services under various graduated mobilization response conditions.

PART B—ENCOURAGING IMPROVEMENT OF THE DEFENSE INDUSTRIAL BASE

SEC. 211. RECOGNITION OF MODERNIZED PRODUCTION SYSTEMS AND EQUIPMENT IN CONTRACT AWARD AND ADMINISTRATION.

(a) IN GENERAL.—The President, acting through the Administrator for Federal Procurement Policy, shall prescribe an acquisition policy requiring, to the maximum extent practicable, that the acquisition plan for any major system acquisition, or any other acquisition program designated by the Secretary or agency head responsible for such acquisition, provide for contract solicitation provisions which encourage competing offerors to acquire for utilization in the performance of the contract modern industrial facilities and production systems (including hardware and software), and other modern production equipment, that increase the productivity of the offerors and reduce the costs of production.

(b) AUTHORIZED SOLICITATION PROVISIONS.—Contract solicitation provisions referred to in subsection (a) may include any of the following provisions:

(1) An evaluation advantage in making the contract award determination.

(2) An increase of not more than 10 percent in the amount which would otherwise be reimbursable to a contractor as the Government's share of costs incurred for the acquisition of production special tooling, production special test equipment, and production special systems (including hardware and software) for use in the performance of the contract.

(3) A provision for the contractor to share in any demonstrated cost savings that are attributable to increased productivity resulting from the following contractor actions not required by the contract—

(A) the acquisition and utilization of modern industrial facilities and production systems (including hardware and software), and other modern production equipment, for the performance of the contract; or

(B) the utilization of other manufacturing technology improvements in the performance of the contract.

SEC. 212. PROCUREMENT OF CRITICAL COMPONENTS OR CRITICAL TECHNOLOGY ITEMS.

(a) SUBCONTRACTING.—The President, acting through the Administrator for Federal Procurement Policy, shall prescribe an acquisition policy requiring that any solicitation for the procurement of critical components or critical technology items shall—

(1) specify the minimum percentage of the total estimated value of the contract that is to be performed by one or more domestic firms;

(2) provide for the attainment of such requirement by the firm as prime contractor, or by subcontractors pursuant to a subcontracting plan submitted with the prime contractor's offer;

(3) specify that a source selection factor relating to the requirement specified in paragraph (1) shall accord—

(A) such source selection factor a value not to exceed 10 percent of the total evaluation points for all source selection factors specified in the solicitation; and

(B) such evaluation points in proportion to the extent to which each offer meets or exceeds the specified percentage;

(4) provide that attainment of the percentage specified in the offer of the firm receiving the award shall be a material element of contractual performance; and

(5) require the contractor to—

(A) identify, at the conclusion of contract performance, each subcontractor whose performance is to be counted towards attainment of the contractual requirement specified pursuant to paragraph (1); and

(B) provide prompt notice to the contracting officer after replacing any such subcontractor.

(b) CRITICAL COMPONENTS AND CRITICAL TECHNOLOGY ITEMS.—The President, acting through the Secretary of Defense, shall—

(1) determine the components or items that are critical components or critical technology items; and

(2) publish a list of such critical components and critical technology items in the Federal Acquisition Regulation.

(c) DEFINITIONS.—For the purpose of this section—

(1) the term "domestic firm" has the same meaning as the term "domestic source" in section 702 of the Defense Production Act of 1950; and

(2) the terms "critical components" and "critical technology items" have the same meanings as in section 702 of the Defense Production Act of 1950.

SEC. 213. SENSE OF THE CONGRESS REGARDING ENCOURAGEMENT OF INVESTMENT.

It is the sense of the Congress that, in order to encourage investment to maintain our Nation's technological leadership, to preserve the strength of our industrial base, and to encourage contractors to invest in advanced manufacturing technology, advanced production equipment, and advanced manufacturing processes, the Secretary of Defense as part of his study of the defense acquisition process under the Defense Management Review shall consider—

(1) the full cost allowability of independent research and development/bid and proposal; and

(2) an increase in the progress payment rate on defense contracts.

PART C—MISCELLANEOUS

SEC. 221. GAO STUDY OF STATE FOREIGN INVESTMENT INCENTIVE PROGRAMS.

(a) IN GENERAL.—The Comptroller General of the United States shall conduct a study of State incentive programs used to attract foreign investment. In conducting such study, the Comptroller General shall evaluate the costs and benefits of such programs, including job creation and economic growth, as well as potential adverse economic effects on United States firms, and recommend what measures the States might take, if any, to ensure that the economic benefits of such programs warrant the costs.

(b) REPORT.—Not later than 12 months after the date of enactment of this Act, the Comptroller General shall transmit to the Congress a report on the study under subsection (a).

SEC. 222. DISCOURAGING UNFAIR TRADE PRACTICES.

(a) SUSPENSION OR DEBARMENT AUTHORIZED.—A finding that a contractor has engaged in an unfair trade practice, as defined in subsection (b), shall indicate a lack of business integrity or business honesty that seriously and directly affects the responsibility of the contractor to perform any contract awarded by the Federal Government or perform a subcontract under such a contract. Such contractor may be subject to suspension and debarment in accordance with subpart 9.4 of title 48, Code of Federal Regulations (or any successor regulation).

(b) DEFINITIONS.—For purposes of this section, the term "unfair trade practice" means the commission of any of the following acts by a contractor:

(1) An unfair trade practice, as determined by the International Trade Commission, for a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337).

(2) A violation of any agreement of the Coordinating Committee on Export Controls or any similar bilateral export control agreement, as determined by the Secretary of Commerce.

(3) A knowingly false statement regarding a material element of a certification concerning the foreign content of an item of supply, as determined by the Secretary of the department or the head of the agency to which such certificate was furnished.

TITLE III—AMENDMENT TO RELATED LAWS

SEC. 301. DEFENSE PRODUCTION ACT FUND PROJECTS.

Section 2502 of title 10, United States Code, is amended by adding at the end the following:

"(d) DEFENSE PRODUCTION ACT FUND PROJECTS.—The Secretary of Defense, acting through the Under Secretary of Defense for Acquisition, shall review and approve projects recommended for support through the Defense Production Act Fund pursuant to the authorities provided by title III of the Defense Production Act of 1950.".

TITLE IV—FAIR TRADE IN FINANCIAL SERVICES

SEC. 401. SHORT TITLE.

This title may be cited as the "Fair Trade in Financial Services Act of 1990".

SEC. 402. EFFECTUATING THE PRINCIPLE OF NATIONAL TREATMENT FOR BANKS AND BANK HOLDING COMPANIES.

The International Banking Act of 1978 (12 U.S.C. 3101 et. seq.) is amended by adding at the end the following:

"NATIONAL TREATMENT

"SEC. 15. (a) PURPOSES.—This section is intended to—

"(1) encourage foreign countries to accord national treatment to United States banks and bank holding companies that operate or seek to operate in those countries; and

"(2) seek an end to discrimination against United States banks and bank holding companies.

"(b) ANNUAL REPORTS REQUIRED.—For each calendar year beginning on or after January 1, 1991, the Secretary of the Treasury shall, not later than May 1 of the following calendar year, submit to the Congress a report—

"(1) identifying each foreign country—

"(A) that, according to the most recent report submitted under section 3602 of the Omnibus Trade and Competitiveness Act of 1988, does not accord national treatment to United States banks and bank holding companies; and

"(B) with respect to which no determination under subsection (d)(1) is in effect;

"(2) explaining why the Secretary has not made, or has rescinded, such a determination with respect to that country; and

"(3) describing the results of negotiations conducted pursuant to subsection (c)(1).

"(c) NEGOTIATIONS REQUIRED.—

"(1) IN GENERAL.—The Secretary of the Treasury shall initiate negotiations with any foreign country described in subparagraphs (A) and (B) of subsection (b)(1) to ensure that that country accords national treatment to United States banks and bank holding companies.

"(2) NEGOTIATIONS NOT REQUIRED.—Paragraph (1) does not require the Secretary of the Treasury to initiate negotiations with a foreign country if the Secretary—

"(A) determines that such negotiations would be fruitless or would impair national economic interests; and

"(B) gives written notice of that determination to the chairman and ranking minority member of the Committee on Banking, Housing, and Urban Affairs of the Senate and of the Committee on Banking, Finance and Urban Affairs of the House of Representatives.

"(d) DISCRETIONARY SANCTIONS.—

"(1) IN GENERAL.—A Federal banking agency may, in consultation with the Secretary of the Treasury, deny any application, and disapprove any notice, filed by a person of a foreign country if the Secretary has published in the Federal Register (and has not rescinded) a determination that the foreign country does not accord national treatment to United States banks and bank holding companies.

"(2) REVIEW.—The Secretary of the Treasury shall annually review any determination under paragraph (1) and decide whether that determination should be rescinded.

"(e) PREVENTING EXISTING ENTITIES FROM BEING USED TO EVADE THIS SECTION.—

"(1) IN GENERAL.—If a determination under subsection (d)(1) is in effect with respect to a foreign country, no bank, foreign bank described in section 8(a), branch, agency, commercial lending company, or other affiliated entity that is a person of that country shall, without prior approval pursuant to paragraph (3) or (4), directly or indirectly, in the United States—

"(A) commence any line of business in which it was not engaged as of the date on which that determination was published in the Federal Register; or

"(B) conduct business from any location at which it did not conduct business as of that date.

"(2) Exception.—Paragraph (1) shall not apply with respect to transactions under section 2(h)(2) of the Bank Holding Company Act of 1956.

"(3) State-supervised entities.—

"(A) This paragraph shall apply if—

"(i) the entity in question is an uninsured State bank or branch, a State agency, or a commercial lending company;

"(ii) the State requires the entity to obtain the prior approval of the State bank supervisor before engaging in the activity described in subparagraph (A) or (B) of paragraph (1); and

"(iii) no other provision of Federal law requires the entity to obtain the prior approval of a Federal banking agency before engaging in that activity.

"(B) The State bank supervisor shall consult about the application with the appropriate Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act). If the State bank supervisor approves the application, the supervisor shall notify the appropriate Federal banking agency and provide the agency with a copy of the record of the application. During the 45-day period beginning on the date on which the appropriate Federal banking agency receives the record, the agency may, after consultation with the State bank supervisor, issue an order disapproving the activity in question. The period for disapproval under the preceding sentence may, in the agency's discretion, be extended for not more than 45 days.

"(4) Federal approval.—If the transaction is not described in paragraph (3)(A), the entity in question shall obtain the prior approval of the appropriate Federal banking agency.

"(5) Informing state supervisors.—The Secretary of the Treasury shall inform State bank supervisors of any determination under subsection (d)(1).

"(6) Effect on other law.—Nothing in this subsection shall be construed to relieve the entity in question from any otherwise applicable requirement of Federal law.

"(f) National Treatment Defined.—A foreign country accords national treatment to United States banks and bank holding companies if it offers them the same competitive opportunities (including effective market access) as are available to its domestic banks and bank holding companies.

"(g) Person of a Foreign Country Defined.—A person of a foreign country is a person that—

"(1) is organized under the laws of that country;

"(2) has its principal place of business in that country;

"(3) in the case of an individual—

"(A) is citizen of that country, or

"(B) is domiciled in that country; or

"(4) is directly or indirectly controlled by a person described in paragraph (1), (2), or (3).

"(h) EXERCISE OF DISCRETION.—In exercising discretion under this section—

"(1) the Secretary of the Treasury and the Federal banking agencies shall act in a manner consistent with the obligations of the United States under a bilateral or multilateral agreement governing financial services entered into by the President and approved and implemented by the Congress; and

"(2) the Federal banking agencies, in consultation with the Secretary of the Treasury—

"(A) shall consider, with respect to a bank, foreign bank, branch, agency, commercial lending company, or other affiliated entity that is a person of a foreign country and is already operating in the United States—

"(i) the extent to which that foreign country has a record of according national treatment to United States banks and bank holding companies; and

"(ii) whether that country would permit United States banks and bank holding companies already operating in that country to expand their activities in that country even if that country determined that the United States did not accord national treatment to that country's banks and bank holding companies; and

"(B) may further differentiate between entities already operating in the United States and entities that are not already operating in the United States, insofar as such differentiation is consistent with achieving the purposes of this section.".

SEC. 403. EFFECTUATING THE PRINCIPLE OF NATIONAL TREATMENT FOR SECURITIES BROKERS AND DEALERS.

Section 15(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)) is amended by adding at the end the following new paragraph:

"(11) NATIONAL TREATMENT.—(A) This paragraph is intended to encourage foreign countries to—

"(i) accord national treatment to United States brokers and dealers that operate or seek to operate in those countries; and

"(ii) seek an end to discrimination against United States brokers and dealers.

"(B) For each calendar year beginning on or after January 1, 1991, the Secretary of the Treasury shall, not later than May 1 of the following calendar year, submit to the Congress a report—

"(i) identifying each foreign country—

"(I) that, according to the most recent report submitted under section 3602 of the Omnibus Trade and Competitiveness Act of 1988, does not accord national treatment to United States brokers and dealers; and

"(II) with respect to which no determination under subparagraph (D)(i) is in effect;

"(ii) explaining why the Secretary has not made, or has rescinded, such a determination with respect to that country; and

"(iii) describing the results of negotiations conducted pursuant to subparagraph (C)(i).

"(C)(i) The Secretary of the Treasury shall initiate negotiations with any foreign country described in subclauses (I) and (II) of subparagraph (B)(i) to ensure that that country accords national treatment to United States brokers and dealers.

"(ii) Clause (i) does not require the Secretary of the Treasury to initiate negotiations with a foreign country if the Secretary—

"(I) determines that such negotiations would be fruitless or would impair national economic interests; and

"(II) gives written notice of that determination to the chairman and ranking minority member of the Committee on Banking, Housing, and Urban Affairs of the Senate and of the Committee on Energy and Commerce of the House of Representatives.

"(D) The following provisions shall apply if the Secretary of the Treasury has published in the Federal Register (and has not rescinded) a determination that a foreign country does not accord national treatment to United States brokers and dealers:

"(i) The Commission may, in consultation with the Secretary of the Treasury—

"(I) deny any application for registration under this subsection filed by a person of that foreign country; and

"(II) prohibit any person of that foreign country from acquiring control of a registered broker or dealer, irrespective of when the acquisition was initiated.

"(ii) No person of that foreign country, acting directly or indirectly, shall acquire control of any registered broker or dealer unless—

"(I) the Commission has been given notice 45 days in advance of the acquisition, in such form as the Commission shall prescribe by rule; and

"(II) the Commission has not prohibited the acquisition.

"(iii) The Commission may, by order, extend the notice period with respect to any particular acquisition for not more than 60 days.

"(iv) The Secretary of the Treasury shall annually review any determination under this subparagraph and decide whether that determination should be rescinded.

"(E) A foreign country accords national treatment to United States brokers and dealers if it offers them the same competitive opportunities (including effective market access) as are available to its domestic brokers and dealers.

"(F) A person of a foreign country is a person that—

"(i) is organized under the laws of that country;

"(ii) has its principal place of business in that country;

"(iii) in the case of an individual—

"(I) is a citizen of that country, or

"(II) is domiciled in that country; or

"(iv) is directly or indirectly controlled by a person described in clause (i), (ii), or (iii).

"(G) In exercising discretion under this paragraph—

"(i) the Secretary of the Treasury and the Commission shall act in a manner consistent with the obligations of the United States under a bilateral or multilateral agreement governing financial services entered into by the President and approved and implemented by the Congress; and

"(ii) the Commission, in consultation with the Secretary of the Treasury—

"(I) shall consider, with respect to a broker or dealer that is a person of a foreign country and is already operating in the United States—

"(aa) the extent to which that foreign country has a record of according national treatment to United States brokers and dealers; and

"(bb) whether that country would permit United States brokers or dealers already operating in that country to expand their activities in that country even if that country determined that the United States did not accord national treatment to that country's brokers or dealers; and

"(II) may further differentiate between entities already operating in the United States and entities that are not already operating in the United States, insofar as such differentiation is consistent with achieving the purposes of this paragraph.".

SEC. 404. EFFECTUATING THE PRINCIPLE OF NATIONAL TREATMENT FOR INVESTMENT ADVISERS.

Section 203 of the Investment Advisers Act of 1940 (12 U.S.C. 80b-3) is amended by adding at the end the following new subsection:

"(i) NATIONAL TREATMENT.—

"(1) PURPOSES.—This subsection is intended to encourage foreign countries to—

"(A) accord national treatment to United States investment advisers that operate or seek to operate in those countries; and

"(B) seek an end to discrimination against United States investment advisers.

"(2) ANNUAL REPORTS REQUIRED.—For each calendar year beginning on or after January 1, 1991, the Secretary of the Treasury shall, not later than May 1 of the following calendar year, submit to the Congress a report—

"(A) identifying each foreign country—

"(i) that, according to the most recent report submitted under section 3602 of the Omnibus Trade and Competitiveness Act of 1988, does not accord national treatment to United States investment advisers; and

"(ii) with respect to which no determination under paragraph (4) is in effect;

"(B) explaining why the Secretary has not made, or has rescinded, such a determination with respect to that country; and

"(C) describing the results of negotiations conducted pursuant to paragraph (3)(A).

"(3) NEGOTIATIONS REQUIRED.—(A) The Secretary of the Treasury shall initiate negotiations with any foreign country described in clauses (i) and (ii) of paragraph (2)(A) to ensure that that country accords national treatment to United States investment advisers.

"(B) Subparagraph (A) does not require the Secretary of the Treasury to initiate negotiations with a foreign country if the Secretary—

"(i) determines that such negotiations would be fruitless or would impair national economic interests; and

"(ii) gives written notice of that determination to the chairman and ranking minority member of the Committee on Banking, Housing, and Urban Affairs of the Senate and of the Committee on Energy and Commerce of the House of Representatives.

"(4) DISCRETIONARY SANCTIONS.—The following provisions shall apply if the Secretary of the Treasury has published in the Federal Register (and has not rescinded) a determination that a foreign country does not accord national treatment to United States investment advisers:

"(A) The Commission may, in consultation with the Secretary of the Treasury, deny any application, and disapprove any notice, filed pursuant to this title by a person of that foreign country.

"(B) The Commission may, in consultation with the Secretary of the Treasury, prohibit any person of that foreign country from acquiring control of a registered investment adviser, irrespective of when the acquisition was initiated.

"(C) No person of that foreign country, acting directly or indirectly, shall acquire control of any registered investment adviser unless—

"(i) the Commission has been given notice 45 days in advance of the acquisition, in such form as the Commission shall prescribe by rule; and

"(ii) the Commission has not prohibited the acquisition.

"(D) The Commission may, by order, extend the notice period with respect to any particular acquisition for not more than 60 days.

"(E) The Secretary of the Treasury shall annually review any determination under this paragraph and decide whether that determination should be rescinded.

"(5) NATIONAL TREATMENT DEFINED.—A foreign country accords national treatment to United States investment advisers if it offers them the same competitive opportunities (including effective market access) as are available to its domestic investment advisers.

"(6) PERSON OF A FOREIGN COUNTRY DEFINED.—A person of a foreign country is a person that—

"(A) is organized under the laws of that country;

"(B) has its principal place of business in that country;

"(C) in the case of an individual—

"(i) is a citizen of that country, or

"(ii) is domiciled in that country; or

"(D) is directly or indirectly controlled by a person described in subparagraph (A), (B), or (C).

"(7) EXERCISE OF DISCRETION.—In exercising discretion under this subsection—

"(A) the Secretary of the Treasury and the Commission shall act in a manner consistent with the obligations of the United States under a bilateral or multilateral agreement governing financial services entered into by the President and approved and implemented by the Congress; and

"(B) the Commission, in consultation with the Secretary of the Treasury—

"(i) shall consider, with respect to an investment adviser that is a person of a foreign country and is already operating in the United States—

"(I) the extent to which that foreign country has a record of according national treatment to United States investment advisers; and

"(II) whether that country would permit United States investment advisers already operating in that country to expand their activities in that country even if that country determined that the United States did not accord national treatment to that country's investment advisers;

"(ii) may further differentiate between entities already operating in the United States and entities that are not already operating in the United States, insofar as such differentiation is consistent with achieving the purposes of this subsection.".

SEC. 405. CONFORMING AMENDMENTS SPECIFYING THAT NATIONAL TREATMENT INCLUDES EFFECTIVE MARKET ACCESS.

(a) QUADRENNIAL REPORTS ON FOREIGN TREATMENT OF UNITED STATES FINANCIAL INSTITUTIONS.—Section 3602 of the Omnibus Trade and Competitiveness Act of 1988 (22 U.S.C. 5352) is amended—

(1) in paragraph (3), by striking "and securities companies" and inserting ", securities companies, and investment advisers"; and

(2) by adding at the end the following: "For purposes of this section, a foreign country denies national treatment to United States entities unless it offers them the same competitive opportunities (including effective market access) as are available to its domestic entities.".

(b) NEGOTIATIONS TO PROMOTE FAIR TRADE IN FINANCIAL SERVICES.—Section 3603(a)(1) of the Omnibus Trade and Competitiveness Act of 1988 (22 U.S.C. 5353(a)(1)) is amended by inserting "effective" after "banking organizations and securities companies have".

(c) PRIMARY DEALERS IN GOVERNMENT DEBT INSTRUMENTS.—Section 3502(b)(1) of the Omnibus Trade and Competitiveness Act of 1988 (22 U.S.C. 5342) is amended—

(1) by striking "does not accord to" and inserting "does not offer";

(2) by inserting "(including effective market access)" after "the same competitive opportunities in the underwriting and distribution of government debt instruments issued by such country"; and

(3) by striking "as such country accords to" and inserting "as are available to".

TITLE V—EFFECTIVE DATES

SEC. 501. EFFECTIVE DATES.

(a) In General.—Except as provided in subsection (b), the provisions of this Act shall take effect on August 10, 1990.

(b) Special Rules.—(1) Title IV of this Act takes effect on the date of enactment of this Act.

(2) The acquisition policies required by title II of this Act shall be incorporated as part of the Federal Acquisition Regulation within 270 days after enactment. Such policies shall apply to solicitations issued 60 days after such regulations are issued.

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